Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

(T.D. 90–83)

SUSPENSION OF INDIVIDUAL BROKER'S LICENSE NO. 4900;
KAY BENNETT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary of the Treasury on July 26, 1990, in accordance with the settlement of the disciplinary proceedings instituted under 19 U.S.C. 1641 by the U.S. Customs Service on July 1, 1989, suspends the individual broker's license (no. 4900) issued to Kay Bennett for a period of 150 days.

Dated: October 23, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, October 30, 1990 (55 FR 45710)]

U.S. Customs Service

General Notices

19 CFR Part 111

ANNUAL USERS FEE FOR CUSTOMS BROKER'S PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of due date of broker's user fee.

SUMMARY: This document advises Customs brokers that for 1991 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association, or corporate broker is due by January 2, 1991. This announcement is being published to comply with the Tax Reform Act of 1986.

DATE: Due date for fee: January 2, 1991.

FOR FURTHER INFORMATION CONTACT: Raymond R. Janiszewski, Chief, Broker Compliance and Evaluation Branch (202) 566-5307.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272) established that an annual user fee of $125 is to be assessed for each Customs broker's permit held by an individual, partnership, association, or corporate broker. This fee is set forth in the Customs Regulations in section 111.96 (19 CFR 111.96).

Section 111.96, Customs Regulations, provides that the fee is payable for each calendar year in each district where a broker has a permit to do business by the due date which will be published in the Federal Register annually.

Section 1893 of the Tax Reform Act of 1986 (Pub. L. 99-514), provides that notices of the date on which payment is due of the user fee for each broker permit shall be published by the Secretary of the Treasury in the Federal Register by no later than 60 days before such due date.

This document notifies brokers that for 1991 the due date for payment of the user fee is January 2, 1991. It is expected that annual user fees for brokers for subsequent years will be due on or about the first of January each year.

Dated: October 24, 1990

MICHAEL H. LANE
Acting Commissioner of Customs.

[Published in the Federal Register, October 30, 1990 (55 FR 45603)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 26, 1990.

The following are documents of the United States Customs Service, Office of Commercial Operations, determined to be of sufficient interest to the public and Customs field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(O.C.O.D. 90-2)

This document holds that goods from territories formerly known as East Germany or the German Democratic Republic that were entered or withdrawn from warehouse for consumption on and after October 3, 1990 will be considered products of the Federal Republic of Germany. Specific conditions and instructions for addressing these conditions are set forth in this memorandum. Office of the Assistant Commissioner, Office of Commercial Operations, document ENT-l-CO:T:R:I MR (9271074), dated September 28, 1990.

Document No.: 9271074
Date: September 28, 1990;
File: ENT-1CO:T:R:I MR
Category: INA

TO: All Assistant Regional Commissioners (Operations)

FROM: Assistant Commissioner
Commercial Operations

RE: Status of goods from territories formerly known as East Germany

PASS TO: All National Import Specialists, Import Specialists, Inspectors and other interested parties such as brokers and importers.

The State Department has informed us that: "as of October 3, 1990, the German Democratic Republic will disappear as a sovereign state and will become a part of the Federal Republic of Germany. It would therefore, be appropriate to treat those goods that would have been considered products from the GDR, and were entered or withdrawn from warehouse for consumption on and after October 3, 1990 as products of the FRG for customs purposes."

Action:

All goods originating in the territory now known as East Germany and entered or withdrawn from warehouse on or after October 3:

1. Will be granted MFN status and will qualify for Column 1 duty rates.

2. Must be marked either Made in Germany or Made in Federal Republic of Germany. A grace period of one year ending on October 4, 1991 will be granted during which Made in West Germany, Made in the Federal Republic of Germany, Made in East Germany and Made in German Democratic Republic will be accepted. Subsequent to October 4, 1991, the marking of Made in East Germany or Made in German Democratic Republic will be accepted provided that:

A. The importer of the goods certifies to Customs that such goods were produced prior to October 3, 1990, or

B. The customs officer is otherwise satisfied from the nature and condition of the goods that they were produced before October 3, 1990.

Marking of goods as Made in FRG or Made in GDR will not be allowed.

3. Any existing dumping cases against companies in what is now known as East Germany will apply to the entire country.

4. Any existing dumping cases against companies in what is now known as West Germany will apply to the entire country.

5. Quotas on goods from what is now known as West Germany will apply to the entire country.

6. Quotas on goods from what is now known as East Germany will no longer apply.

7. Instructions on how to handle shipments subject to VRAs will follow shortly.

8. 100% duty sanctions on EC products that apply to what is now known as West Germany will apply to the entire country.

9. Pasta shipments from what is now known as East Germany will be subject to the US/EC Pasta Agreement and will require the appropriate P1 or P2 certificate.

Any questions should be referred to Maria Reba on FTS 566-7060, use area code (202) if commercial.

SAMUEL H. BANKS.

(O.C.O.D. 90–3)

This document addresses the export certificate requirements under the United States-German Democratic Republic Voluntary Restraint Arrangement (VRA) and conditions to be met as of October 3, 1990 when the German Democratic Republic became part of the Federal Republic of Germany on that date. Office of Commercial Operations, Office of Trade Operations, document SPE-2-07-CO:TR:T FRC (9275061) dated October 2, 1990.

Document No. 9275061
Date: October 2, 1990
File SPE-2-07-CO:TR:T FRC
Category: MET

TO: All Assistant Regional Commissioners (Operations),

FROM: Director, Office of Trade Operations

RE: Export certificate requirements under the U.S.-German Democratic Republic Steel Voluntary Restraint Arrangement (VRA)

REFERENCE: (A) Instruction 9260061, September 17, 1990 (export certificate requirements)
(B) Instruction 9271073, September 28, 1990 (status of goods from the GDR)

PASS TO: Regional Program Managers, Port Directors, Import Specialists and National Import Specialists handling steel products, Entry Officers, Inspectors, and other interested parties such as brokers and importers.

1. When the German Democratic Republic (GDR) becomes a part of the Federal Republic of Germany on October 3, 1990 (Reference B), exports of steel products from the Territory known as the GDR prior to October 3, 1990, will be subject to provisions of the European Communities (EC) arrangement, including EC certification requirements and product coverage. Therefore, beginning on October 3, 1990, such exports should be accompanied by a valid, original EC export certificate based upon EC product coverage as noted in Ref. A.

2. For exports of steel products from the Territory known as the GDR prior to October 3, 1990, continue to accept export certificates issued by the GDR based upon GDR product coverage also as noted in Ref. A.

3. If any shipment of covered steel products exported on or after October 3, 1990, from the territory known as the GDR prior to October 3, 1990, is accompanied by an Export Certificate issued by the GDR, call Sblenda Sblendorio at the Department of Commerce at FTS or (202) 377-1359 for clearance.

4. Any questions regarding this matter should be directed to art stern of the Department of Commerce at FTS or (202) 377-1385 or to Frank Crowe of the Textiles and Metal Products Branch at FTS or (202) 566-9262.

VICTOR G. WEEREN.

(O.C.O.D. 90–4)

This document, Office of Trade Operations Fact Sheet No. 23, addresses a decision of the Office of Regulatory Audit, concerning the Certificate of Origin requirements for indirect materials which will be used in the manufacturing process. Office of Commerical Operations, Office

of Trade Operations document INA-CO:T:R:I RJ (9253081), dated September 20, 1990.

Document No. 9253081
Date: September 20, 1990
File: INA-CO:T:R:I RJ
Category: INA

TO: All Assistant Regional Commissioners (Operations), District, Area and Port Directors; All Customs Attaches and Senior Customs Representatives

FROM: Director, Office of Trade Operations

RE: U.S./Canada FTA – Audit – Need for Exporters Certificates of Origin for Indirect Materials – *Fact Sheet 23*

PASS TO: Please pass to all Regional Program Managers, National Import Specialists, Import Specialists, Entry Officers, Inspectors and other interested parties such as Brokers and Importers

PURPOSE: To distribute an administrative decision issued by the Office of Regulatory Audit dealing with the Certificate of Origin requirements for indirect materials which will be used in the manufacturing process.

Issue:

Is there an origin requirement (Exporters Certificate of Origin required) for indirect materials under any of the following conditions:

a. Indirect materials such as gloves, safety glasses, tape, etc., used primarily in the manufacturing process, but potentially also used in the repair and maintenance of equipment?

b. Tools and materials that are primarily used in the repair and maintenance of equipment but potentially also used in the manufacturing process?

c. Spare parts that are used exclusively in the repair and maintenance of machinery and equipment?

Facts:

The Canadian manufacturing company has made an election to average its costs of processing and assembly of automotive vehicles produced in Canada for exportation to the United States under the Automotive Products Trade Act or the U.S./Canada Free Trade Agreement. It uses hundreds or thousands of different indirect material items, the origin of which is unknown. These are purchased from a number of North American suppliers. These indirect materials are used or consumed during the production of automotive vehicles, but are not direct materials incorporated in the vehicles. It asserts that indirect materials are, by definition, a direct cost of processing under Article 304(c) and that no sourcing requirement applies. There is, therefore, no requirement for an Exporters

Certificate of Origin to establish territorial origin for these indirect material costs when these indirect materials are used or consumed in the production process.

Analysis:

Indirect materials are defined in Article 304, under the definitions of "materials" "value of materials originating in the territory of either Party or both Parties" and "direct cost of processing or direct cost of assembling." The definition of materials means goods, other than those included as a part of the direct cost of processing or assembling, used or consumed in the production of other goods. In direct materials are materials used or consumed in the production process hut not directly incorporated into the finished article and may therefore, be considered an indirect cost of processing or assembling as a cost when it can reasonably be allocated to the production of goods. Where materials are used or consumed in the production process, and can reasonably be allocated to that production process, the value of such material would be considered territorial without regard to its source country of origin, as stated under "value of materials originating in the territory of either Party or both Parties." As further stated under the definition of direct cost of processing or direct cost of assembling, "the cost of energy, fuel, dies, molds, tooling, and the depreciation and maintenance of machinery and equipment, *without regard to whether they originate within the territory of a Party*". Therefore, the indirect materials such as gloves, safety glasses, tape, etc., would not require an Exporters Certificate of Origin when used or consumed in the production process. The same answer is reached for tools and materials used in the repair and maintenance of equipment and spare parts that are used exclusively in the repair and maintenance of machinery and equipment used in the production process. However an allocation may be required where such cost (expense) is not totally related to the goods being produced for export to the United States or where a portion of such cost (expense) is specifically excluded per the Agreement.

Holding:

Exporters Certificates of Origin are not required for indirect materials used or consumed as a direct cost of processing or direct cost of assembling provided they can reasonably be allocated to the processing or assembling operation. Such indirect materials will be considered territorial costs for the U.S./Canada Free Trade Agreement cost test in determining whether goods produced are eligible.

Inquiries concerning this issuance should be directed to Customs Headquarters, Office of Regulatory Audit, Compliance Division at FTS 566-2812, Commercial (202) 566-2812.

VICTOR G. WEEREN.

(O.C.O.D. 90–5)

This document, Office of Trade Operations Fact Sheet No. 24, addresses a decision of the Office of Regulatory Audit, concerning the Generally Accepted Accounting Principles (GAAP) to be used strictly for determining the value of materials and the direct cost of processing. Office of Commercial Operations, Office of Trade Operations document INA-CO:T:R:I RJ (9253082), dated September 20, 1990.

Document No. 9253082
Date: September 20, 1990
File: INA-CO:T:R:I: RJ
Category: INA

TO: All Assistant Regional Commissioners (Operations), District, Area and Port Directors of Customs; All Customs Attaches and Senior Customs Representatives

FROM: Director, Office of Trade Operations

RE: U.S./Canada FTA – Audit – Generally Accepted Accounting Principles (GAAP) for Determining Value of Materials and Direct Cost of Processing – *Fact Sheet 24*

PASS TO: All Regional Program Managers National Import Specialists, Import Specialists, Entry Officers, Inspectors and other interested parties such as Brokers and Importers

PURPOSE: To distribute an administrative decision issued by the Office of Regulatory Audit dealing with the Generally Accepted Accounting Principles (GAAP) to be used strictly for determining the value of materials and the direct cost of processing.

Issue:

When calculating the percentage of territorial content by dollar value, should the amounts for materials and direct cost of processing be determined in accordance with GAAP in the country of manufacture? Will the accounting method used by the exporter be accepted as complying with GAAP if it is consistent with that used on the company's audited financial statements?

Facts:

None.

Analysis:

Where GAAP applies to specific costs as direct costs of processing or direct costs of assembling and the Free Trade Agreement. (FTA) does not impose a different treatment, such cost will be considered a direct cost for FTA purposes. As stated under the definitions contained in Article 304, the direct cost of processing or direct cost of assembling means the *costs directly incurred in, or that can reasonably be allocated to, the production*

of goods. Although such wording appears to allow any and all costs that can reasonably be allocated to the production of goods, further reading of these definitions appear to place a limit on the inclusion of such costs which only allows those costs that have a direct relationship to the production of the goods. Specifically, certain costs enumerated under the definitions have been excluded, i.e., costs relating to the general expense of doing business, such as the cost of providing executive, financial, sales, advertising, marketing, accounting and legal services, and insurance; brokerage charges relating to the importation and exportation of goods; costs for telephone, mail, and other means of communication; packing costs for exporting the goods; royalty payments related to a licensing agreement to distribute, or sell the goods; rent, mortgage interest, depreciation on buildings, property insurance premiums, maintenance, taxes, and the cost of utilities for real property used by personnel charged with administrative functions; or profit on the goals. The FTA is very specific. An example can be illustrated where GAAP permits the use of an inventory method of averaging costs which would not provide the appropriate degree of identification of the source country of origin of materials for FTA purposes. A manufacturer purchases a fungible material from foreign and territorial suppliers in the ratio of 30 percent foreign and 70 percent territorial material. Without filing an election to average on automotive vehicles the manufacturer was preparing to use the 30/70 percent for each material for use in the production process, considering each separate material qualifying as territorial based on the assumption that 70 percent as greater than the 50 percent cost requirement. In this example we would not accept the GAAP inventory method of averaging to be acceptable for identification of source country of origin.

We are of the opinion that costs incurred by a production facility must be directly incurred in the production of the goods and not merely associated with the production facility necessary to operate such a facility, i.e., nurses to care for employees, accounting personnel involved in physical inventory taking, personnel responsible for purchasing or requisitioning materials to be used or consumed in the production process, second level supervisors and above *not* directly involved in the production process, etc. Thus, it appears that costs incurred as peripheral to the production process are not to be included in the cost calculation for origin purposes. However, they may be required for appraisement purposes.

We can generally say that an inventory method which is capable of identifying the source country of origin for dual source component material to be used in a manufacturing operation, consistently applied, would be acceptable for identifying the source of such component material, i.e., first-in/first-out (FIFO). However, an inventory method which would average the source country of origin using costs by country would not truly reflect the source country of origin for each component material.

Holding:

Under GAAP and/or FTA certain costs are considered and material costs or direct costs of processing/direct costs of assembling, other costs

are considered general and administrative costs of doing business and finally certain costs may be a combination of both and should be apportioned in accordance with GAAP provisions to reflect the appropriate amount that was directly incurred in, or can reasonably be allocated to, the production of goods. Certain costs should be determined on a case-by-case basis where there is doubt as to whether they can and should be considered as being reasonably allocated to the production of goods.

Inquiries concerning this issuance should be directed to Customs Headquarters, Office of Regulatory Audit, Compliance Division, FTS 566-2812, or if dialing commercial (202) 566-2812.

VICTOR G. WEEREN.

(O.C.O.D. 90–6)

This document, Office of Trade Operations Fact Sheet No. 25, addresses a decision of the Office of Regulatory Audit, concerning the treatment of drawback refunds in determining the value of originating and non-territorial materials under the United States-Canada Free Trade Agreement. Office of Commercial Operations, Office of Trade Operations document INA-CO:T:R:I: RJ (9253083) dated September 20, 1990.

Document No.9253083
Date: September 20, 1990
File: INA-CO:T:R:I RJ
Category: INA

TO: All Assistant Regional Commissioners (Operations), District, Area and Port Directors of Customs; All Customs Attaches and Senior Customs Representatives

FROM: Director, Office of Trade Operations

RE: U.S./Canada FTA – Audit – Drawback Refunds – *Fact sheet 25*

PASS TO: All Regional Program Managers, National Import Specialists, Import Specialists, Entry Officers, Inspectors and other interested parties such as Brokers and Importers

PURPOSE: To distribute an administrative decision issued by the Office of Regulatory Audit dealing with the treatment of drawback refunds in determining the value of originating and non-territorial materials under the agreement.

Issue:

Should duty drawback be netted from duties paid when computing "value of materials originating in the territory" and when computing "value of the goods when exported" under the U.S./Canada Free Trade Agreement?

Facts:

The manufacturing company has an ongoing drawback program under which duty drawback is claimed against entries of American, Japanese, and other foreign parts and materials. The drawback refunds are known at the time the materials are imported and are accrued in the current period against the relevant duty paid. Thus, its true duty expense is the duty amount net of the drawback refund. If duty drawback were disregarded in computing the value of materials, the result would be arbitrary values which were not consistent with Generally Accepted Accounting Principles (GAAP).

Analysis:

Currently under the FTA, duty drawback refunds will be allowed as an offset against duty paid on imported merchandise for FTA cost determinations on exportations to the other party for qualifying goods. Beginning January 1, 1994, drawback refunds will no longer be allowed on merchandise exported to the other party under the U.S./Canada Free Trade Agreement. During the period January 1, 1989, through January 1, 1994, the value of materials should not include "eligible" duty drawback refunds authorized where claims are properly filed with Customs, subject to verification, by the processor or assembler of goods being exported to the other party. Such netting treatment is consistent with GAAP since there is no ultimate cost to the processor or assembler.

Holding:

Where the processor or assembler of goods being exported to the Other Party pursuant to the FTA intends to claim drawback on such exportations, the amounts accrued or received (depending upon the accounting method utilized) will be applied against duties paid on imported materials used in the assembly or production of such exported goods.

Inquiries concerning this issuance should be directed to Customs Headquarters, Office of Regulatory Audit, Compliance Division, FTS 566-2812, Commerical (202) 566-2812.

VICTOR G. WEEREN.

(O.C.O.D. 90–7)

This document, Office of Trade Operations Fact Sheet No. 26, addresses a decision of the Office of Regulatory Audit, concerning the proper method of calculating the direct cost of processing when plant exports are in a start-up mode and an automobile manufacturer has made an election to average under Article 1005, United States-Canada Free Trade Agreement. Office of Commercial Operations, Office of Trade Operations document INA-CO:T:R:I RJ (9253084) Dated September 20, 1990.

Document No. 9253084
Date: September 20, 1990
File: INA-CO:T:R:I RJ
Category: INA

TO: All Assistant Regional Commissioners (Operations), District, Area and Port Directors of Customs; All Customs Attaches and Senior Customs Representatives

FROM: Director, Office of Trade Operations

RE: U.S./Canada FTA—Audit—Calculating Direct Cost of Processing in Automotive Manufacturing When Using Election to Average Under Article 1005—*Fact Sheet 26*

PASS TO: All Regional Program Managers, National Import Specialists, Import Specialists, Entry Officers, Inspectors and other interested parties such as Brokers and Importers

PURPOSE: To distribute an administrative decision issued by the Office of Regulatory Audit dealing with the proper method of calculating direct cost of processing when plant exports are in a start-up mode and the automobile manufacturer has made an election to average under Article 1005 of the Agreement.

Issue:

During the initial year of production for export at an automotive plant, what is the proper method of calculating the direct cost of processing when the manufacturer has made an election to average under Article 1005 and the exported goods will be produced during only part of the 12 month fiscal year period for U.S./Canada Free Trade Agreement (FTA) purposes?

Facts:

The automobile manufacturing company is a relatively new North American plant that produced its first vehicles for the Canadian market in 1988. The first units for export to the U.S. were built in 1989, 2 months after the beginning of its fiscal year.

The plant has an annual production capacity of thousands of units. Under current sales plans, approximately 70 percent of production will be sold to the U.S. market and 30 percent to the Canadian market. Production of Canadian units will occur during the full 12 months of the 1990 fiscal year.

Analysis:

Article 1005 of the FTA provides that automobile manufacturers may elect to average the value content calculation over a 12-month period on the same class of vehicles assembled in the same plant. Article 1006 provides the definitions of various classes of passenger vehicles according to cubic feet of passenger and luggage volume.

There is no distinction in this definition between domestic and export units. Thus, the costs to be included in the averaging calculation include all costs related to a class of vehicle, without regard to whether the units are produced for export or for domestic consumption.

The direct cost of processing or direct cost of assembling should include the entire production facility's fiscal year costs directly incurred in, or that can reasonably be allocated to, the production of automotive vehicles of the same class. Therefore, the full 12 month fiscal year period of the production plant is to be used in the determination as to whether the class of automotive vehicles produced at that plant qualify as territorial origin. The direct costs associated with operating the facility are generally standard costs (direct and indirect) directly attributable to the production of the vehicles which must be reconciled and brought back to actual costs at fiscal year end to territorial or foreign costs for FTA calculation purposes. An election may be made for a class of vehicles already in production, however, shipments to the United States have not taken place until the election is made. Costs of producing this class of vehicle have been incurred prior to the election to average. Therefore, the manufacturing company will be required to determine the cost of such vehicle production prior to the election being filed to comply with the election for vehicles shipped to the United States.

If the direct cost test is met for this class of automotive vehicle then all such vehicles exported to the United States, where entry summaries are filed with U.S. Customs on or after an election to average has been filed in proper form, will be afforded FTA treatment for the remainder of said producer's fiscal year. However, where the direct cost test is not met all vehicles of said class exported to the U.S. will *not* be afforded FTA treatment on entry summaries filed on and after an election to average has been filed in proper form for the fiscal year . An election to average automotive vehicles of the same class at the same plant filed in proper form is binding for the plant during the period covered by such election.

Holding:

A plant electing to average its direct cost of processing or assembling automotive vehicles of the same class at the same plant must use its financial year (12 months) in the calculation of territorial origin for vehicles exported to the United States entered on entry summaries on or after the election to average has been filed in proper form. The entire 12 month financial year is required for calculating the direct cost of processing or direct cost of assembling automotive vehicles under an election to average costs for eligibility even where a company makes an election to average its costs on January 1, 1989, and the production facility's financial year begins prior to January 1, 1989, (effective date of the U.S./Canada Free Trade Agreement). For example, a plant has its financial year beginning on April 1, 1988 and ends on March 31, 1989, and makes an election to average its costs on January 1, 1989. This plant is required to average its costs during the entire financial year, April 1, 1988 through March 31, 1989, for the class of vehicle under the election to average produced at such plant. After an election to average has been executed in proper form, it is binding for the remainder of such financial year for said class of vehicle produced at the plant. If said class of vehicle fails to meet

the territorial origin test, all vehicles shipped and entered on entry summaries during such financial year will not qualify for FTA treatment.

Inquiries concerning this issuance should be directed to Customs Headquarters, Office of Regulatory Audit, Compliance Division, FTS 566-2812, Commercial (202) 506-2812.

VICTOR G. WEEREN.

(O.C.O.D. 90–8)

This document, Office of Trade Operations Fact Sheet No. 27, addresses a decision of the Office of Regulatory Audit, concerning the proper method of determining how personnel costs are properly categorized as direct costs of processing or general expenses under the Rules of Origin, United States-Canada Free Trade Agreement. Office of Commercial Operations, Office of Trade Operations, document INA-CO:T:R:I RJ (9253085), dated September 20, 1990.

Document No. 9253085
Date: September 20, 1990
File: INA-CO:T:R:I RJ
Category: INA

TO: All Assistant Regional Commissioners (Operations), District, Area and Port Directors of Customs; All Customs Attaches and Senior Customs Representatives

FROM: Director, Office of Trade Operations

RE: U.S./Canada FTA – Audit – Categorizing Personnel Costs as Direct Costs of Processing or General Expenses – *Fact Sheet 27*

PASS TO: All Regional Program Managers, National Import Specialists, Import Specialists, Entry Officers, Inspectors and other interested parties such as Brokers and Importers

PURPOSE: To distribute an administrative decision issued by the Office of Regulatory Audit dealing with the proper method of determining how personnel costs should be properly categorized as direct costs of processing or general expenses under the Rules or Origin.

Issue:

What departmental personnel costs are properly categorized as direct costs of processing and what costs are categorized as costs relating to the general expenses of doing business for value content determinations under the U.S./Canada Free Trade Agreement?

Facts:

The Canadian manufacturing company, company A, considers itself a pure manufacturing company. Company B and company C are separate

corporations established to perform sales, marketing, and financial functions for company A. Therefore, they consider certain department functions, i.e., Human Resources, Purchasing, Manufacturing, Production Control, and Quality Control personnel costs, to be direct costs of processing. Company A treats Finance and General Affairs personnel costs as costs related to the general expense of doing business.

As a pure manufacturing company, the Human Resources Department is almost entirely dedicated to production-related employees and any portion of the Human Resources budget which might reasonably be allocated to other employees is not material. The Purchasing Department is also dedicated entirely to purchases of manufacturing equipment, production materials, and other items directly associated with the production of goods. Purchase of other items such as office supplies are made by the General Affairs Department, whose personnel costs will be treated as a general expense. Company A considers other personnel costs that can reasonably be allocated to the production of goods be included in the direct cost of processing under Article 304.

Analysis:

Article 304, Definitions, are to be used as a guide to the preparation of the direct cost of processing or direct cost of assembling test for use in the calculation for origin determination. The definition explicitly refers to costs directly incurred in or that can reasonably be allocated to, the production of goods. The Agreement provides minimal guidance on what personnel costs are excluded from the direct cost of processing, except for those enumerated in Article 304 (a) and (g). Although there is an enumeration of certain costs which are to be included there may be other costs that can reasonably be allocated to the production of the goods. Labour is defined to include the cost of all labour, including benefits and *on-the-job training*, labour provided in connection with supervision, quality control, shipping, receiving, storage, packaging, management *at the location of the process or assembly*, and other like labour. Although training can be obtained at a location outside or inside the production facility, only *on-the-job training* is cited as includable as a direct cost which can reasonably be allocated to the production of the goods. Thus, other training would require close scrutiny, on a case-by-case basis, to determine whether such cost would be considered a direct cost for the origin test. Personnel involved in the purchasing of materials would not fit within the definition of costs of labour incurred in the production of the goods, since such labour cost is directly associated with obtaining the materials prior to their use in the production process.

Labour costs incurred outside the production facility are not considered part of the cost of production of goods at the location of the process or assembly. Similarly, independent contractors performing tasks outside the production facility would not be included as a cost of the production of the goods. The major difference between including a labour cost or not is whether such cost relates directly to the actual production of the goods and not whether there is some negligible benefit that can be derived from

the cost incurred that can reasonably be allocated to the production of the goods. Labour costs relating to the general expense of doing business, such as the cost of providing executive, financial, sales, advertising, marketing, accounting and legal services, and insurance are specifically excluded from the direct cost of processing or direct cost of assembling for origin calculation purposes. The accounting function includes inventory control personnel, material purchasing personnel, financial personnel, etc. Such costs are not to be included, and may not reasonably be allocated to, the direct cost of processing or the direct cost of assembling for origin determination purposes.

Some costs may fall within a "gray area" as to whether they are considered a direct cost of processing or a direct cost of assembling and will need to be evaluated on a case-by-case basis considering the facts and circumstances surrounding such cost and function. Interest expense incurred on funds borrowed to meet the payroll of personnel who are directly involved in the production process would not be considered a direct cost of processing or assembly, since such cost does not directly relate to the production process and would be considered general and administrative costs or expenses. Some costs may be subject to a method of allocation due to their relationship to the production process or general and administrative expense of doing business. An illustrative example would be where a building is used partially for the production process and partially for general expense purposes (housing the executive, accounting and financial personnel along with production machinery). The rent or depreciation associated with the building would be allocated between production and general expenses for allowable cost calculation purposes.

Where a cost is specifically permitted by the Agreement for cost calculation purposes, such cost is includable, unless an allocation is warranted and required or the facts do not support such cost as part of the calculation of the goods produced. We cannot provide an opinion overall on all costs since the facts and circumstances surrounding each such cost may or may not support the inclusion of all or part of such cost for origin calculation purposes.

Furthermore, we are of the opinion that a plant used solely for the production of goods cannot have all costs of such plant considered as direct costs of processing or direct costs of assembling even where the administrative, sales and marketing functions are performed outside the plant.

Holding:

Under Article 304, U.S./Canada Free Trade Agreement, certain costs are enumerated for inclusion in the direct cost of processing or direct cost of assembling for origin determination purposes. Additionally, certain costs are enumerated which are not included in the direct cost of processing or direct cost of assembling. Although these lists are not all-inclusive, other costs which may or may not be considered direct costs of processing or direct costs of assembling will be determined on a case-by-case basis.

Inquiries concerning this issuance should be directed to Customs Headquarters, Office of Regulatory Audit, Compliance Division, FTS 566-2812, Commercial (202) 566-2812.

VICTOR G. WEEREN.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

CHANGES IN THE CUSTOMS SERVICE FIELD ORGANIZATION; APALACHICOLA, CARRABELLE, AND PORT ST. JOE, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations by closing the ports of entry of Apalachicola and Carrabelle and designating Port St. Joe as a Customs station. Given the inactivity at these ports, together with the necessity for providing full Customs service at such inactive ports, closing Apalachicola and Carrabelle as ports of entry and converting Port St. Joe to a Customs station are warranted by the circumstances. These changes are proposed in order to obtain more efficient use of Customs personnel, facilities and resources, and to provide better service to carriers, importers and the public.

DATE: Comments must be received on or before December 24, 1990.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joseph O'Gorman, Office of Inspection and Control, 202-566-9425.

SUPPLEMENTARY INFORMATION:

Background

Customs ports of entry and stations are locations where Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of Customs and related laws. The significant difference between ports of entry and stations is that at stations, the Federal Government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry or clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not

the salaries of its officers or employees, for service rendered in connection with the entry or delivery of merchandise.

The list of designated Customs ports of entry is set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)) and Customs stations are listed in § 101.4(c), Customs Regulations (19 CFR 101.4(c)). The Customs organizational structure consists of regions, districts, ports of entry within districts, and stations supervised by ports. This change is proposed pursuant to the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449), as well as 5 U.S.C. 301.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to continue to provide better service to carriers, importers, and the public, Customs proposes to close the Apalachicola and Carrabelle ports of entry located in the Florida panhandle area, and at the same time convert Port St. Joe to a Customs station. These ports of entry have been inactive and not manned for a number of years. Only some six vessels were entered at Port St. Joe during the past three-year period.

Adequate Customs service will continue to be provided to the Panhandle region of Florida through the ports of Panama City and Pensacola as well as the proposed Port St. Joe station. Pensacola, Panama City, and Port St. Joe are located along the coast in a linear pattern and are thus able to provide convenient service to importers in that area. In addition, the Port of Mobile is located in close proximity to Pensacola and importers/brokers had indicated their preference for using this larger port of entry to enter and clear merchandise, which is reflected in low workload figures for the Panhandle ports.

Since there generally appears to be no immediate increase in international activity in the Panhandle area, closing these ports of entry would have little if any economic impact in this area, especially in view of the total absence of commercial activity at these ports, except for the little business carried on at Port St. Joe.

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Drafting Information

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Executive Order 12291 and Regulatory Flexibility Act

Because this proposal relates to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

Similarly, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the proposal may have a limited effect upon some small entities in the affected areas, it is not expected to be significant because changes in the Customs field organization in other areas have not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Lists of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Proposed Amendments

It is proposed to amend Part 101, Customs Regulations (19 CFR Part 101) as set forth below:

PART 101—GENERAL PROVISIONS

1. The authority for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States) 1623, 1624.

§ 101.3 [Amended]

2. § 101. 3 (b), Customs Regulations (19 CFR 101.3 (b)), is amended by removing the listings "Apalachicola, Fla.", "Carrabelle, Fla. (E.O. 7508, Dec. 11, 936; 1 FR 2149) ", and "Port St. Joe, Fla. (E.O. 7818, Feb. 17, 1938; 3 FR 503) ", in the column headed "Ports of Entry," in the Tampa, Florida, district of the Southeast Region.

§ 101.4 [Amended]

3. Section 101.4 (c) is amended by inserting, in appropriate alphabetical order, in the listing for "Tampa, Fla." under the "District" column,

"Port St. Joe" in the column headed "Customs stations" and "Panama City" in the column headed "Port of entry having supervision".

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: October 17, 1990.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 24, 1990 (55 FR 42860)]

U.S. Court of Appeals for the Federal Circuit

U.H.F.C. Co., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

John M. Peterson, Neville, Peterson & Williams, of New York, New York, argued for plaintiff-appellant.

A. David Lafer, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Wendell L. Willkie, II*, General Counsel, *Stephen J. Powell*, Chief Counsel for Import Administration and *Thomas G. Ehr*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, D.C., of counsel.

Appeal No. 89-1502

(Decided October 11, 1990)

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before NIES, *Chief Judge,** MARKEY, *Circuit Judge,*** and DUFF, *District Judge.****

NIES, *Chief Judge.*

U.H.F.C. Company appeals from the final judgment of the Court of International Trade in an antidumping proceeding, *U.H.F.C. Co. v. United States*, 706 F. Supp. 914 (Ct. Int'l Trade 1989) (Musgrave, J.). Animal glue imported from the Netherlands has been subject to an antidumping order imposed by the Treasury Department on December 22, 1977. This appeal concerns the second of three review periods conducted since 1980 by the International Trade Administration (ITA), which resulted in a final determination imposing a dumping duty rate of 24.60 percent payable by U.H.F.C., the United States importers of glue sold by the Netherlands manufacturer, B.V. Lijmfabriek C. Trommelen.[1] In arriving at this rate, the ITA concluded that sales in the Netherlands were the appropriate basis for determining foreign market value (FMV); denied

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*Chief Judge Nies assumed the position of Chief Judge which Circuit Judge Markey vacated on June 27, 1990.

***Ibid.*

*** Brian Barnett Duff, Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

[1]It is somewhat ironic that U.H.F.C. Company is an affiliate of Hudson Industries Corporation (Hudson), which is the sole surviving United States manufacturer of animal hide glues. In 1976, Hudson joined with other United States glue manufacturers in petitioning for the imposition of antidumping duties on imports of animal glue from the Netherlands and other countries. Said petitions resulted in the imposition of Treasury Decision 78-2, the antidumping duty order against Animal Glue and Inedible Gelatin from the Netherlands, 42 Fed. Reg. 3928 (1977). After said order was imposed, Hudson found it necessary to supplement its domestic production by importing glues from the Netherlands and elsewhere.

U.H.F.C.'s request for price adjustments based on certain physical differences between the glues sold in the United States and in the home market; and calculated the dumping margin based on the FMV of a glue grade less similar to the U.S. glue than other glues sold in the home market. In making its determination, the ITA invoked its authority under 19 U.S.C. § 1677e(b) (redesignated in 1988 as § 1677e(c)[2]) to use the "best information otherwise available" because, in ITA's view, Trommelen had failed to supply certain information as requested by ITA.

After the ITA published its final determination, U.H.F.C. brought suit in the Court of International Trade challenging (1) the selection of home market sales as the basis for determining FMV; (2) the denial of certain price adjustments; and (3) the selection of sales of a less similar home market glue in calculating the dumping margin. The Court of International Trade affirmed the methodology used by the ITA to determine the dumping margin in all respects. U.H.F.C. appealed the trial court's decision to this court pursuant to 28 U.S.C. § 1295(a)(5) (1988). We now reverse and remand.

I

BACKGROUND

This is a trade case involving the importation of animal glues from the Netherlands which have been sold at a price less than their fair value. Animal glues are produced and sold in different, identifiable grades. The glue grade is determined on the basis of comparative jelly-strength and viscosity value. The glue is generally priced based on its jelly strength, with weak jelly, 30 bloomgrams, being the lowest priced and very strong jelly, 500 bloomgrams, being the highest priced. Glues of different strength can be blended in linear mathematical proportions to yield a glue of desired strength. For example, an order for 200 pounds of glue at 300 bloomgrams could be filled by mixing 100 pounds of 250 bloomgram glue with 100 pounds of 350 89-1502 bloomgram glue. Animal glues may be used in widely varying applications such as general adhesives, abrasives or sizing agents.

Representatives of the United States animal glue industry filed a petition with the Secretary of the Treasury seeking the imposition of antidumping duties against animal glue imports from the Netherlands. After an affirmative less-than-fair-value determination by the Department of the Treasury[3] and an affirmative injury determination by the International Trade Commission,[4] Treasury published a dumping order against *Animal Glue and Inedible Gelatin from the Netherlands*. See 42 Fed. Reg. 64115 (1977). Thereafter, authority for administering the antidumping laws was transferred to the Commerce Department, and ITA

[2]See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1331(1) (codified as amended at 19 U.S.C. § 1677e (1988)).

[3]See 42 Fed. Reg. 39289-90 (1977).

[4]See 42 Fed. Reg. 57565 (1977).

has conducted three administrative reviews of the animal glue dumping duty.

· This action concerns the second of these review periods, covering the animal glue entries made by U.H.F.C. that were purchased from Trommelen spanning December 1, 1980 through November 30, 1981. *See* 48 Fed. Reg. 45583-84 (1983). During this review period, Trommelen sold to U.H.F.C. for import into the United States glue grades having strengths of 250, 350, 365, 380 and 450 bloomgrams. At the same time, Trommelen sold glue grades in the Netherlands having bloomgram strengths of 150, 170, 190, 210, 220, 230, 260, 290, 300 and 400. Trommelen made no sales to the United States of glues identical in grade to those sold in the Netherlands. The grades are normally a function of customer requirements.

Administrative reviews of antidumping duty orders are conducted pursuant to 19 U.S.C. § 1675 (1982).[5] To determine the dumping margin, the statute instructs ITA to separately determine the United States price (USP) and the foreign market value (FMV) and then subtract the USP from the FMV to arrive at the dumping margin which becomes the duty rate. See 19 U.S.C. § 1675(a)(2) (1988).

Determining FMV first requires the ITA to establish which foreign market sales to use. To this end, Congress has mandated a statutory hierarchy aimed at achieving the best approximation of the value of the good in the foreign market. The statute prescribes, in pertinent part:

> **§ 1677b. Foreign market value.**
>
> (a) Determination: fictitious market: sale agencies
>
> For purposes of this subtitle—
>
> (1) In general
>
> The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—
>
> (A) at which *such or similar merchandise* is sold or, in the absence of sales, offered for sale *in the principal markets of the country from which exported*, in the usual wholesale quantities and in the ordinary course of trade for home consumption, *or*
>
> (B) if not sold or offered for sale for home consumption, or *if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the Price at which so sold or offered for sale for exportation to countries other than the United States*, * * * [Emphasis added.]

Thus, where there are sales of "such or similar merchandise" in the home market which satisfy subparagraph A, such sales are to be used as the basis for determining FMV provided they are not too "small in relation to

[5] At the time of the administrative reviews in dispute here, the antidumping statute procedures mandated periodic reviews of dumping duties on a yearly basis. See 19 U.S.C. § 1675(a) (1982). This procedure was subsequently changed in 1986 to require administrative reviews annually when requested by interested parties. See 19 U.S.C. § 1675(a) (1988).

the quantity sold for exportation to countries other than the United States as to form an adequate basis for comparison."

To aid in determining whether the "quantity [of such or similar merchandise] sold for home consumption" forms a sufficient basis for comparison, the ITA promulgated regulation 19 C.F.R. § 353.4(a) (1988):[6]

> (a) *In General.* If it is established * * * that during the representative period chosen for investigation, the *quantity of such or similar merchandise* sold for consumption in the country of exportation is so small in relation to the quantity sold for exportation to countries other than the United States (*normally, less than 5% of the amount sold to third countries*) as to be an inadequate basis for determining the foreign market value of the merchandise imported into the United States, *the foreign market value of the imported merchandise shall be determined either by reference to the price at which such or similar merchandise is sold or offered for sale for exportation to countries other than the United States or by reference to its constructed value.* [Emphasis added.]

The products that are to be considered "such or similar merchandise" in determining which market is to serve as a basis for FMV pursuant to section 1677b(a)(1) are defined in a hierarchical fashion in 19 U.S.C. § 1677(16) (1988). Section 1677(16) provides:

> (16) Such or similar merchandise
>
> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise. [Emphasis added.]

[6] Now found in 19 C.F.R. § 353.58 (1990).

In response to the ITA's 1981 review period antidumping questionnaire, Trommelen requested that sales to other countries, namely Rumania and the United Kingdom, be used for calculating foreign market value because Trommelen's sales in the Netherlands accounted for only 4.9 percent of its total sales (including the United States and the Netherlands) during the review period.

The ITA instead found that Trommelen's home market sales sufficed to serve as the basis for establishing FMV. The ITA reasoned that all animal glue sales in the Netherlands were "such or similar merchandise" under section 1677(16)(C) because the range of glue grades sold in the Netherlands "may reasonably be compared" with the range of glue grades sold in the United States as a result of the many "common uses" to which the glues might be put. Taking all of Trommelen's sales in the Netherlands into account, the ITA determined that home market sales were not too small under the statute and implementing regulation, because these sales amounted to 6.07 percent of the quantity sold to countries other than the United States during the period.

Once the ITA selected the Netherlands as the foreign market, Trommelen submitted a supplemental questionnaire which claimed price adjustments based upon the differences between the quantity of sales in the Netherlands as compared with the U.S. sales and upon differences in jelly-strength. To support these price adjustments, Trommelen submitted price lists of other companies which showed approximate costs across many jelly-strengths and another company, Eschem, Inc., submitted a method for computing the cost of glue at any jelly-strength by blending prices. The antidumping statute requires, where properly established, adjustments to the foreign market value, inter alia, for "the amount of any difference between the USP and the FMV that is wholly or partly due to * * * the fact that [similar merchandise] under [19 U.S.C. § 1677(16)] (B) or (C) is used in determining FMV." See 19 U.S.C. § 1677b(a)(4) (1988).

In implementing the determination of this statutory adjustment, Commerce promulgated regulation 353.16, see 19 C.F.R. § 353.16 (1988),[7] which provides direction regarding price adjustments based on differences in physical characteristics between similar merchandise:

> **§ 353.16 Differences in physical characteristics.**
>
> In comparing the United States price with the selling price in the home market * * * in the case of similar merchandise, due allowance *shall be made* for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary *will be guided primarily by the differences in cost of production*, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, *when appropriate, the effect of such differences upon the market value of the merchandise may also be considered.* In the case

[7]Now found in 19 C.F.R. § 353.57 (1990).

> of merchandise which does not lend itself to comparison with other merchandise for the purpose of this section, *any method reasonably calculated to reflect the impact on cost or value of any differences in the merchandise under consideration may be used.* Differences in costs of producing merchandise with identical physical characteristics as end products will not be considered appropriate adjustments. [Emphasis added.]

Based on this regulation, the ITA requested that the Dutch manufacturers supply cost of production information on each of the glue strengths sold in the home market so that ITA could determine whether such price adjustments based on physical differences could be made. Trommelen responded that it could not provide such specific information, stating:

> Every glue batch produced in our plant gives another quality. We produce qualities in the jellystrength range of 160 up to 520 bloomgrams. In order to blend a lot of 20 tons you need at least 4 different batches of 5 tons. Consequently it is not possible to give firm blending formulas for each grade sold in the USA and Holland. The final result depends on several factors. * * *
>
> We already informed that apart from volume of the transaction the jellystrength expressed in bloomgrams is determining the price. In order to give you a guideline to convert the prices to comparable qualities, we suggest that you take our standard prices for the supplied qualities, which were valid during the major part of the period of investigation.* * *

The ITA denied the adjustments requested by Trommelen, and rejected Eschem's submission, responding that "section 353.16 of the Commerce Regulations provides that adjustments for *physical* differences in merchandise *must be* based on the differences in the cost of production" (emphasis supplied).

After making these determinations, the ITA made its preliminary determination of the dumping margin. In the absence of foreign sales of identical glue grades, the ITA was placed in the position of having to arrive at a dumping margin by subtracting the USP from the FMV of "similar" glue grades sold in the Netherlands. In such cases, according to the ITA, it has adopted a policy of using the home market merchandise "most similar" to the merchandise sold in the United States. For U.S. glue grades 350, 365, 380 and 450, the ITA chose home market glue grade 400. For U.S. grade 250, the ITA stated that it could not determine the "most similar" glue and instead invoked its authority under section 1677e(b), the "best information" rule, to choose grade 300, a relatively higher priced glue, bypassing use of home market grades 230, 260 and 290. The ITA then calculated the dumping margin to be 23.7 percent and published its preliminary results. See 48 Fed. Reg. 2030 (1983).

After the preliminary results were published, the ITA received comments from Olympic Adhesives, Inc.,[8] another former U.S. manufacturer and then importer, who objected to comparing 300 strength glue in the Netherlands with 250 strength glue sold in the United States, claiming that 230 strength glue sold in the Netherlands was more similar than 300 in accordance with the ITA's policy of selecting the "most similar" merchandise for comparison, that 230 strength glue had been used as the basis for comparison with 250 strength glue in the previous review period, and that the ITA was constrained by the statute, 19 U.S.C. § 1677(16), to follow a hierarchy in choosing merchandise for comparison. See 48 Fed. Reg. 45583-84 (1983). The ITA acknowledged that 230 strength glue "appears to be more similar to quality 250," and that 230 glue had been used in the previous review but justified using 300 strength glue due to Trommelen's failure to provide adequate cost of production data which required the ITA to invoke their statutory authority under 19 U.S.C. § 1677e(b) to use the "best information otherwise available." Id. at 45584. The ITA then published its final results, which set the dumping margin for the period at 24.60 percent. *Id.*

U.H.F.C. then commenced the instant suit in the Court of International Trade pursuant to 19 U.S.C. § 1516a (1988), seeking review of the final determination made by the ITA for the 1981 review period. U.H.F.C. contested the choice of home market sales in the Netherlands as the basis for determining FMV, the denial of price adjustments attributable to differences in physical characteristics between similar merchandise, and the choice of the FMV of 300 quality glue as the glue to be compared with the USP of 250 quality glue for purposes of calculating the dumping margin.

The Court of International Trade agreed with the ITA's decision to use home market sales, concluding that the ITA did not abuse its discretion in finding the entire range of glue grades sold in the Netherlands to be similar to the range of glues sold to the United States, and that the ITA's reliance on home market sales was based on a reasonable interpretation of the statute. The court also agreed with the ITA's denial of price adjustments concluding that the ITA reasonably invoked its authority to resort to the "best information" rule, given that Trommelen had failed to supply requested cost of production data and that the data supplied was not a reliable indicator of value. Finally, the court declined to disturb the ITA's choice of 300 grade glue for comparison to U.S. grade 250 glue in arriving at the dumping margin, concluding that the ITA properly invoked the "best information" rule in rejecting Netherlands sales of grade 230 glue and that grade 300 glue was "similar" to U.S. grade 250 under 19 U.S.C. § 1677(16)(C).

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[8] *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990), which contains additional information on this industry.

II
Issues

1. Whether the ITA correctly concluded that sales in the Netherlands were sufficient to serve as the basis for determining FMV under 19 U.S.C. § 1677b(a) and 19 C.F.R. § 353.4(a)?

2. Whether the ITA's denial of price adjustments for differences in physical characteristics under 19 U.S.C. § 1677b(a)(4) and 19 C.F.R. § 353.16 was supported by substantial evidence and otherwise in accordance with law?

3. Whether the ITA's choice, as the "best information otherwise available" under 19 U.S.C. § 1677e(b), of home market sales of grade 300 glue as the basis for FMV for comparison with the USP of 250 grade glue when calculating the dumping margin is supported by substantial evidence?

III
Discussion

U.H.F.C. brought this action pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988) which permits any interested party to commence an action in the Court of International Trade to review final determinations of administrative reviews of antidumping duty orders. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1570 (Fed. Cir. 1990). "We review that court's review of an [agency] determination by applying anew the statute's express judicial review standard." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10, 2 Fed. Cir. (T) 130, 133 n.10 (Fed. Cir. 1984). Thus, we must determine whether the Court of International Trade correctly concluded that the ITA's determination was supported by substantial evidence on the record and was otherwise in accordance with law. See 19 U.S.C. § 1516a(b)(1) (1988).

A. *Netherlands Sales as Basis for FMV:*

The government argues, and the court agreed, that the ITA's selection of sales in the home market was proper because the ITA reasonably concluded from the evidence that the range of glue strengths sold in the Netherlands, were "such or similar merchandise" under definition (C) of section 1677(16) and that the total amount of these sales was sufficient to serve as the basis for FMV per statute and regulation. Appellant counters that the conclusion that all Netherlands sales are "such or similar merchandise" when compared with the glue strengths sold in the United States is unsupported, and that, in any event, only those sales of glue grades actually used by the ITA in calculating the dumping margin are sufficiently similar to be used to determine whether the amount of home market sales is sufficient to serve as the basis for FMV. We are unpersuaded, however, that the ITA's selection of home market sales is unsupported or that the ITA's interpretation of the statute governing the selection of the basis for FMV is unreasonable.

The antidumping statute sets up a mandatory hierarchy for determining which geographic market is to be used as the basis for establishing

FMV. *See* 19 U.S.C. § 1677b(a) (1988). The statute dictates that the FMV be established using the *first market* that qualifies, and expresses a preference for home market sales (country of manufacture). *Id.*; *see also Washington Red Raspberry Comm'n*, 859 F.2d 898, 902 (Fed. Cir. 1988); *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 204 (Ct. Int'l Trade 1986). One condition the antidumping statute places on the use of the preferred geographic market, the home market, is that sales of such or similar merchandise in this market not be "so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison." 19 U.S.C. § 1677b(a)(1)(b) (1988); *see also Motorcycle Batteries From Taiwan; Final Determination of Sales at Less Than Fair Value*, 47 Fed. Reg. 9264, 9264, 9266 (1982). The implementing regulation for this statutory limitation, found at 19 C.F.R. § 353.4(a) (1988), among other things, sets forth a figure of 5 percent as the lower threshold below which sales in the home market, when compared to sales to all other countries excluding the United States, will normally be considered inadequate to permit home market sales to serve as the basis for FMV. *See, e.g., Elemental Sulphur from Canada; Results of Administrative Review of Antidumping Finding*, 47 Fed. Reg. 14507, 14508 (1982).

Applying these statutory sections and regulations to the 1981 review period, the ITA concluded that home market sales were sufficient to serve as the basis for FMV. The ITA had found that sales of all home market glues regardless of grade were "such or similar merchandise" with respect to the glue grades sold in the United States under section 1677(16)(C). In accordance with the statute and regulation, the ITA then totalled the home market sales of all glue grades and compared that amount with the total glue sales to other countries, excluding the United States, and found home market sales to represent 6.07 percent of sales to third countries. Thus, the sales to the home market exceeded the 5 percent regulatory threshold and glue sales in the Netherlands were sufficient to serve as the basis for FMV.

U.H.F.C. first asserts that ITA's determination that home market sales are sufficient as a basis for FMV must fail because it rests on an erroneous subsidiary finding that all glues sold by Trommelen in the Netherlands, regardless of glue grade, are "such or similar merchandise" with respect to all sales to the United States, regardless of glue grade. Specifically, U.H.F.C. contests, as unsupported by substantial evidence, the ITA's finding that all glues, regardless of grade, "may reasonably be compared" with glues sold to the United States under section 1677(16)(C). The ITA found that the glues "may reasonably be compared" regardless of grade based on the evidence showing many common uses to which the glues may be put. The government points to a Trommelen brochure that states:

> Our product is exported to more than 35 countries all over the world. It is essential in the production of the following articles. Abrasives—

Matches—Composed Cork Products—Currency and Security Papers—Musical Instruments—Textiles, etc.

The brochure goes on to provide instructions on how to process glues of different grades to obtain glue of any desired strength. The brochure can reasonably be understood to demonstrate that any glue grade, either with or without processing, might be used in any of the mentioned applications depending on the glue strength needed for the particular application, i.e., that the glue grades have many common uses.

Thus, we conclude that the record contains substantial evidence that the glue grades have many common uses. We further agree with the government that substantial evidence supports the conclusion that home market glues regardless of grade "may reasonably be compared" based on their many "common uses." And since the other criteria of section 1677(16)(C) are not in dispute, the conclusion necessarily follows that the ITA's finding that all home market glues are "such or similar merchandise" under section 1677(16)(c) is supported by substantial evidence.

U.H.F.C. next asserts that glue sales in the Netherlands did not meet the 5 percent threshold of 19 C.F.R. § 353.4(a) because the ITA found only two grades, 300 and 400, to be sufficiently "similar" to serve as the basis for FMV, and that these grades amount to only 2.42 percent of the amount sold to third countries. We agree with the government that this argument confuses the difference between "similar merchandise" and "most similar" merchandise. The determination of the dumping margin requires calculation of an FMV and a USP, and subtracting the USP from the FMV. *See* 19 U.S.C. § 1675(a)(2). The ITA found, and that finding is supported by substantial evidence, that all glues sold to the home market were "similar merchandise" for purposes of determining the market which serves as the *basis for* FMV. Once the home market is found to be a viable basis for FMV, the ITA has adopted a policy of matching the USP of merchandise with the FMV of the merchandise "most similar" to it in an effort to obtain the most accurate dumping margin using whatever market has been found to be the basis for FMV.[9] *See, Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1578, 1 Fed. Cir. (T) 130, 140-41 (Fed. Cir. 1983) (antidumping law administered to achieve fair "apples to apples" comparison); *see also, Certain Unfinished Mirrors from Portugal*, 51 Fed. Reg. 43409 (1986) (two-part methodology of determining dumping margin followed); *Shop Towels of Cotton From the People's Republic of China; Final Results of Administrative Review of Antidumping Duty Order*, 50 Fed. Reg. 26020, 26021 (1985) (same).

It is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451

[9]For instance, in this case, the ITA found Netherlands grade 300 most similar for U.S. grade 250 and 400 grade most similar for the remaining grades sold to the United States.

(1978); *Consumer Prods. Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1038-39, 3 Fed. Cir. (T) 83, 89-90 (Fed. Cir. 1985); *Smith-Corona*, 713 F.2d at 1582, 1 Fed. Cir. (T) at 142-43. U.H.F.C. points to nothing in the statute or regulation that transforms the merchandise ITA considers "most similar" for purposes of computing the dumping margin under section 1675(a)(2) into the "such or similar merchandise" that must be considered to establish which market serves as the basis for FMV under section 1677b(a)(1). Indeed, the statute expressing a preference for home market as the basis for FMV requires that the sufficiency of sales in the home market be determined by reference to quantities of "such or similar merchandise" as defined in section 1677(16). As previously shown, the ITA's finding that all sales of glue in the Netherlands are "such or similar merchandise" is supported by substantial evidence. The statute and implementing regulations require no more.

We, therefore, uphold as a reasonable interpretation of the statute ITA's two-step policy of first determining which merchandise is "such or similar" in order to establish which market is to serve as the basis for FMV and then selecting which "such or similar" merchandise is the "most similar" in order to use the FMV for the latter in quantifying the dumping margin.

U.H.F.C. concludes that assuming the home market sales surpass the 5 percent threshold, that this 5 percent mark is not a hard and fast rule, but merely a rule of thumb that can be overcome and is overcome by the evidence it presented in this case. U.H.F.C. cites to prior determinations published by ITA as an indication that the ITA has "itself noted many factors" to be evaluated when judging whether the home market furnishes an adequate basis for FMV, and reasons that consideration of relevant factors mandates a finding that the home market was not a viable market. *See, e.g., Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 34941, 34942 (1980). U.H.F.C. points to evidence which shows that sales of identical glues in third countries are of grades *identical* to those sold to the United States; that the third country markets are larger, primary markets in contrast to the Netherlands which is a subsidiary market; and that sales to third countries were verified and made in quantities more comparable to those sales made to the United States. Coupled with the goal of the antidumping duty law to seek comparison of transactions in different markets on the most nearly comparable terms, U.H.F.C. argues that this evidence "compel[s] the use of third-country sales as the basis for FMV." The short answer to this argument is that the goal of the antidumping duty laws is carried forth in the statutory and regulatory provisions, which express a preference for the home market as the basis for FMV and here have been properly interpreted and applied by the ITA to support the use of home market sales as the basis for FMV. Evidence of the structure of third-country markets, as compared with the home market (size of markets, quantities of goods sold, identity of goods sold with those sold to the United States) even if considered relevant by the ITA, are simply insufficient to overturn a supported finding

by the ITA that the statutorily preferred market, the home market, establishes a viable basis for determining FMV.

B. *Denial of Price Adjustments for Physical Differences:*

The ITA denied Trommelen's request for adjustments to the FMV under 19 U.S.C. § 1677b(a)(4) and 19 C.F.R. § 353.16 based on acknowledged physical differences between the glue strengths found to be similar merchandise. Appellant urges that the ITA erroneously based its denial of price adjustments on the reasoning that price adjustments for physical differences must be made from cost of production information which it was impossible for appellant to supply. Since the glue making process is a continuous one which yields batches of various strengths, cost of production information on a per grade basis simply does not exist and therefore could not be supplied. On appeal, the government acknowledges, as the court recognized, that 19 C.F.R. § 353.16 does not *require* price adjustments to be based only on cost of production information, and that a contrary interpretation would contravene that regulation. The regulation provides, in pertinent part:

> [D]ue allowance shall be made for differences in the physical characteristics of the merchandise * * * guided primarily by the differences in cost of production * * * but, when appropriate, *the effect of such differences upon the market value of the merchandise may also be considered*. In the case of merchandise which does not lend itself to comparison with other merchandise for the purpose of this section, *any method* reasonably calculated to reflect the impact on cost or value of any differences in the merchandise under consideration may *be used*. [Emphasis added.]

19 C.F.R. § 353.16. Per its express terms, the regulation expresses a *preference* for adjustments to be based on cost of production information, but the regulation specifically contemplates and authorizes adjustments based on other methods as well, including the effect of a physical characteristic on the market value of the merchandise. Thus, an interpretation of this regulation restricting price adjustments to differences in cost of production would render nugatory a considerable portion of the regulation's express terms. If, as U.H.F.C. suggests, the ITA's decision is premised on such an interpretation, it clearly cannot stand. *See, e.g., Barber v. United States*, 676 F.2d 651, 658, 230 Ct. Cl. 287, 298 (1982); *Aparacor, Inc. v. United States*, 571 F.2d 552, 557, 215 Ct. Cl. 596, 605 (1978).

According to the court, however, Trommelen's submission to ITA showing how *price* data could be used to make adjustments for differences in glue strength was deficient because it showed that the difference in prices was not "dispositive of *value*, and by extension, physical difference." *U.H.F.C. Co.*, 706 F. Supp. at 922. To support this statement, the court relied upon evidence showing that Trommelen's price data indicated that the same strength was sold at different prices in the home market and that Trommelen had indicated that there is in fact *an inverse relationship* between the strengths of glues and their cost of production. Id. The court thus concluded that:

> Given the fact that Trommelen failed to provide the requested cost of production information and that the price information in question was not a reliable indicator of value, the ITA used other information, i.e., the "best information available." * * * On this basis the ITA declined to make an adjustment to foreign market value for physical differences in the merchandise, and the Court finds that this denial is supported by substantial evidence and is otherwise in accordance with law. *Id.*

It is clear that the court was of the view that the ITA's reason for denying price adjustments did not lie solely in the failure to provide cost of production information, but also rested on the ITA's determination that the alternative information actually submitted for adjusting differences was insufficient or unreliable.

Appellant argues that the latter rationale set out by the court to sustain the agency's denial of price adjustments represents an impermissible post hoc rationalization. The agency did not articulate this position until trial so that the court, per U.H.F.C., decided the alternative data was inadequate and not the agency. According to appellant, the agency's decision rested solely on the agency's unreasonable requirement that price adjustments in this case be calculated on the basis of differences in cost of production data. We agree.

On review, a court, including the Court of International Trade, is constrained to apply the applicable standard of review to the rationale put forth by the agency in support of its action. *Citizens to Preserve Overton Park, Inc. v. Secretary of Transp.*, 401 U.S. 402, 413 (1971). Post-hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination. *See, Burlinqton Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Atcor, Inc. v. United States*, 658 F. Supp. 295, 299 (Ct. Int'l Trade 1987).

In its final determination, the agency stated that:

> The department requested cost of production data * * * so that we could make adjustments for physical differences in merchandise. The producer failed to provide adequate data, and as a result, we make [the] comparison * * * (without adjustments for differences).

48 Fed. Reg. at 45584. Further, Eschem, Inc., another Dutch glue manufacturer involved here, submitted a lengthy correspondence explaining a method for calculating price adjustments based on the blending prices of individual glue strengths. The ITA's response leaves no doubt of ITA's view that no price adjustments could be made here without cost of production data:

> Section 353.16 of the Commerce Regulations provides that adjustments for physical differences in merchandise must be based on the differences in the cost of production.

Whether this was due to a legally erroneous interpretation of the regulation by the staff at the time or simply bureaucratic rigidity is immaterial. The record consistently demonstrates that the only basis for ITA's decision to deny price adjustments was the failure of the manufacturers to

supply cost of production information for individual grades which would establish that higher grades cost more to produce.

In any event, if the agency did imply somewhere in the record that the data actually submitted was inadequate, the agency's denial of price adjustments for that reason would be unsupportable. ITA did not establish that it was entitled to use the "best information otherwise available" by reason of the failure or refusal of the Dutch manufacturers to submit requested information.[10]

Both the ITA and the court acknowledged that price is generally determined by glue strength, with higher bloomgram strength glues generally commanding higher prices. Thus, price differences for each bloomgram strength generally reflect the value attached to that physical difference. Moreover, there is an inverse relationship between glue strengths and cost of production. Further, the evidence showing that some glues of lesser strengths were sold at higher prices does not refute that the price information provided by Trommelen on each glue strength was indicative of the value of this difference in glue strength.

The inverse relationship between cost of production and glue strength reflects the realities of the animal hide and bone glue manufacturing process. As explained to us, this process resembles the pressing of olives or grapes in that the first pressing yields the highest quality and successive pressings yield lesser qualities compared to the first. But because it takes more pressings to obtain the lesser quality, in a sense the lesser costs more. No one would dispute, however, that the juice or oil obtained in the first pressing, being higher quality, has a greater value. So it is with the manufacture of animal hide and bone glues. In this situation as well, the relationship between the cost of production and grades of product is "inverse" and, thus, cost of production would tell nothing about the relationship between physical differences and the value of the glue. In addition, the strengths obtained vary with starting materials. Thus, cost of production can only be related to batches not individual grades. ITA did not dispute this fact but resorted to the "best information" rule simply because the manufacturers did not, even though they could not, supply the requested information for cost differences in production of different grades.

As we held in *Olympic Adhesives, Inc.*, 899 F.2d at 1571:

> The basic error we perceive arises from the ITA's overly sweeping view of the authority it is granted under section 1677e(b). In essence, the ITA interprets the phrase "whenever a party * * refuses or is unable to produce information requested" to cover, in the ITA's discretion, any inadequacy or insufficiency of a reply to a request for any type of information. Indeed, even where a reply is complete, the ITA

[10] 19 U.S.C. § 1677e(b) provides:

(b) Determination to be made on best information available

In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

> may, as it did in this case, conclude that the information does not answer a question it wishes to resolve, and for that reason the party is deemed to "refuse" or "be unable to supply" information within the meaning of the statute. We cannot agree that the ITA's authorization under section 1677e(b) extends so far.

In this case as well, the ITA may not resort to the "best information" where the party's failure to give information is because the information does not and could not exist.

With respect to the evidence that glues of lesser strengths were sold in the same quantities for higher prices, we agree with U.H.F.C. that to require absolute consistency of prices would be absurd and out of step with commercial realities. Indeed, many variables go into the pricing equation, such as, the immediacy of a customer's need, the quantity ordered, the presence of a fixed-price contract, or the availability at the time of competitive products. Given the dynamics of the commercial marketplace, one would expect to find, as appears in this case, variations in the pricing of the same bloomgram strength and some sales of higher bloomgram strength glues at prices lower than prices of lesser strength glues. The government's reference to one instance where 300 bloomgram strength glue was sold during the review period for a lower price than an identical quantity of 210 bloomgram strength glue is comparable to finding one bad apple and concluding all in the bushel are spoiled. The record of home market sales during the review period indicates that the majority of sales of 230 bloomgram glue sold at prices between 3,65 and 3,85 dutch florins; the majority of sales of 300 strength glue at 4,25 and 4,45 florins; and the majority of sales of 400 strength glue at 5,75 florins. Thus, the record reveals, as the ITA and court acknowledged, that the value of any glue is directly related to a physical characteristic of that glue, namely the glue strength. In light of the relationship between price and physical difference, we find it necessary to remand to the court with instructions to direct the ITA to make price adjustments based on differences in physical characteristics between the merchandise sold in the home market and in the United States.

C. *Choice of "Similar Merchandise" for FMV to Use in Calculation of Dumping Margin:*

With respect to Appellant's challenge to the ITA's selection of 300 strength glue sold in the Netherlands as the FMV for comparison with the USP of 250 strength glue in calculating the dumping margin, our decision reversing and remanding for determination of price adjustments based on differences in physical characteristics between the similar glue grades requires a redetermination of FMV after adjustments are made. Thus, the issue whether the ITA's selection of nonadjusted 300 grade glue over nonadjusted 230 grade glue as the FMV for comparison with the USP of 250 grade glue is rendered moot. *See Advance Transformer Co. v. Levinson*, 837 F.2d 1081, 1084, 5 USPQ2d 1600, 1603 (Fed. Cir. 1988); *Fonar Corp. v. Johnson and Johnson*, 821 F.2d 627, 634, 3 USPQ2d 1109, 1114 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988).

IV

CONCLUSION

That part of the judgment based on the Court of International Trade's decision affirming the ITA's use of home market sales in the Netherlands is affirmed because all home market glue grades were properly determined to be "such or similar merchandise" and the quantity of home market sales was properly found to be sufficient to serve as the basis for FMV. That part of the judgment based on the the court's decision that the ITA properly denied price adjustments based on physical differences is reversed because the ITA was not justified in resorting to the "best information" rule. Further, because the record reflects that the value of glue is directly related to the strength of the glue, the case must be remanded to the court with instructions to direct ITA to recalculate the dumping margin after making price adjustments for differences in physical characteristics between each glue strength.

V

COSTS

Costs are awarded to Plaintiff-Appellant.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

EASTALCO ALUMINUM CO., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

John M. Peterson, Neville, Peterson & Williams, of New York, New York, argued for plaintiff-appellant.

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and Joseph I. Liebman, Attorney in Charge, International Trade Field Office.

Appeal No. 90-1130

(Decided October 18, 1990)

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MARKEY, LOURIE, and CLEVENGER, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

Eastalco Aluminum Company ("Eastalco") appeals the judgment of the U.S. Court of International Trade holding that certain carbon blocks imported in 1981 "must be classified under item 517.91 as articles of carbon or graphite, a general category" within the Tariff Schedules of the United States (1981) ("TSUS"). *Eastalco Aluminum Co. v. United States*, No. 83-01-00095, slip op. at 5 (Ct. Int'l Trade Oct. 19, 1989). We affirm.

I

The articles at issue are blocks used to line an aluminum reduction cell that produces aluminum metal by electrolysis of fused aluminum oxide salts contained in molten electrolyte baths. The blocks are made from anthracite coal extracted from La Mure mine in France. The coal is heated, mixed with coal tar pitch, shaped into blocks, and heated again, prior to importation. Initially, the U.S. Customs Service had classified the blocks as "electrodes," but that determination was reversed in an earlier Court of International Trade opinion because a major portion of the function of the blocks was to provide a heat insulating capability. *Eastalco Aluminum Co. v. United States*, No. 83-1-00095 (Ct. Int'l Trade Sept. 23, 1986). On remand, the Customs Service classified the blocks as carbon and graphite articles and that determination was affirmed by the Court of International Trade. On appeal here, Eastalco asserts that the blocks should be classified as "other" refractory bricks under item 531. 27 of the TSUS.

II

The Customs Simplification Act of 1954, Pub. L. No. 768, ch. 1213, § 101, 68 Stat. 1136, 1136 (1954), directed the Tariff Commission to make a comprehensive study of U.S. laws prescribing the tariff status of imported articles. Pursuant to that Act, the Tariff Commission prepared the TSUS and an accompanying report, the Tariff Classification Study (1960) ("*TCS*"). The TSUS was enacted into law verbatim by the Tariff Classification Act of 1962, Pub. L. No. 87-456, 76 Stat. 72 (1962), *repealed by* Harmonized Tariff Schedule of 1988, Pub. L. No. 100-418, 102 Stat. 1148 (codified at 19 U.S.C. § 1202 (1988)). Refractory bricks were classified under Schedule 5 ("Nonmetallic minerals and related products"), Part 2 ("Ceramic Products") of the TSUS. In order to be classified as refractory brick, as contended by Eastalco, an article had to meet the definition of "ceramic article" found at headnote 2(a) of Schedule 5, Part 2, of the TSUS (1981). Headnote 2(a) reads:

> a "*ceramic article*" is a shaped article having a glazed or unglazed body of crystalline or substantially crystalline structure, which body is composed essentially of inorganic nonmetallic substances and either is formed from a molten mass which solidifies on cooling, or is formed and subsequently hardened by such heat treatment that the body, if reheated to pyrometric cone 020, would not become more dense, harder, or " less porous, but does not include any glass article * * *.

19 U.S.C. § 1202, Schedule 5, Part 2 headnote 2(a) (1976).

In explaining the definition of ceramic article found in the TSUS, the *TCS* stated in relevant part:

> The term "ceramic article", as used and defined in schedule 5, has a meaning differing only slightly from the classical definition of the word. * * * Because of changing technology, however, many ceramic products are made without clay, for example pure oxide articles, devitrified glass articles, and some cermets.

> The definition of "ceramic articles" specifically excludes any glass article from its scope. The primary distinction between the ceramic articles of part 2 and glass articles of part 3 is that glass is essentially noncrystalline in structure whereas ceramic ware is essentially crystalline. It is true, of course, that opalescent glass does have small quantities of finely divided crystals but they are not present in sufficient amount to present any serious problem. Ceramic articles have a body which is substantially crystalline. A recent development in the ceramic field concerns devitrified glass articles presently made by patent process and sold under the trade name "Pyroceram". This product is essentially crystalline in structure, but it is formed by a glass-making process.

TCS, Schedules 5-6 at 77-78 (1960).

The parties agree that the blocks in question satisfy the requirements of headnote 2(a) in all respects but one: whether they are of "substantially crystalline structure." If so, the blocks are entitled to entry as refractory bricks. If not, they are to be classified as articles of carbon or graphite.

III

At trial, experts of both parties testified as to whether the blocks were "substantially crystalline" within the meaning of headnote 2(a). The contradictory testimony was based on X-ray diffraction peaks, thermal history, and measurements of intermolecular d-spaces. The trial judge found the expert witnesses equally credible, and ruled their conflicting testimony to be in equipoise on the issue of whether the blocks were substantially crystalline. Eastalco's expert testified that he considered the blocks to be fifty percent or more crystalline. He opined that "fifty percent crystalline or greater would be considered substantially crystalline." The Government's expert indicated his view that the blocks were less than fifty percent crystalline. Neither expert, however, had quantified by test the amount of crystallinity in the blocks.

The testimony revealed that quantitative testing could be performed to measure the crystalline content of the blocks. A mutually acceptable protocol for such quantitative testing was established. The results of the tests, which neither party contests, indicated a crystalline content of 5% for the blocks, more or less 1%. The Court of International Trade held that the results of the agreed test undercut the strength of Eastalco's expert's view and provided dispositive support for the opinion of the government's expert that the blocks were not substantially crystalline, and therefore could not be classified as refractory brick.

IV

Eastalco contends that the court erred, as a matter of law, in construing the words "substantially crystalline" in the TSUS to refer to a quantitative crystalline content and to require the presence of a substantial percentage of crystalline content in order to be deemed ceramic. Eastalco maintains to the contrary that the statutory meaning of "ceramic" is plainly established by the other parameters of the statute, namely the

thermal history, heat testing and hardening characteristics, and that the "substantial crystallinity" words in headnote 2(a) only require that the blocks have acquired some crystalline carbon ordering. Furthermore, Eastalco contends that rather than using volume fractions of crystalline content, the statutory criterion is fulfilled by measuring the intermolecular d-spacing as a dependable indicator of the degree of crystallization.

V

Statutory interpretation is a question of law. *Hasbro Ind. v. United States,* 879 F.2d 838, 840 (Fed. Cir. 1989). The statute requires that an article be "substantially crystalline" to be classified as a ceramic article. The plain meaning of that term, however, is not apparent from the face of the statute. The legislative history of the statute is sparse, and refers us to the Tariff Commission's submitted report. S. Rep. No. 1317, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. Adm. News 1641, 1642. The formal report, the *TCS*, has been recognized as a part of the legislative history. *Nippon Kogaku (USA), Inc. v. United States*, 673 F. 2d 380, 383 (CCPA 1982) . As noted above, the TCS addresses the difficulty of classifying recently-developed articles . In adopting the TSUS, Congress agreed with the TCS that the "classical definition" of ceramic articles should be expanded to include some non-traditional items. To accommodate that expansion, Congress adopted the concept of a "substantially crystalline" limitation upon the definition of ceramic articles. In so limiting ceramic articles to items that were substantially crystalline, Congress excluded from "ceramic" entitlement some silica-derived substances, glass and opalescent glass, while including others, devitrified glass. Since the dividing line between these substances, as expressly stated in the legislative history, is whether they have "small quantities" or "sufficient amounts" of crystalline structure, the adverbial adjective, "substantially, " was meant to impart a quantitative limitation. As a matter of statutory construction, we affirm the holding of the Court of International Trade that the test of whether a material is substantially crystalline is quantitative. Furthermore, the cited portions of the TCS indicate that the amount envisioned for a ceramic article was to exceed trivial percentages such as that found in opalescent glass.

Eastalco also argues that the intermolecular d-spacing data demonstrate the "essentially crystalline" nature of the blocks. Interspacing data may, in some instances, demonstrate that the molecular structure of an article is crystalline, especially when the average intermolecular spacing corresponds exactly to the known intermolecular spacing of a specific crystal. However, the fact that the intermolecular d-spaces of the blocks may be close to that of crystalline carbon (graphite) does not answer the required question of whether the blocks have a substantially crystalline structure within the meaning of headnote 2(a), especially in light of the crystalline content test results.

Finally, Eastalco contends that since the blocks satisfy the majority of the highly specific and technical requirements under item 531.27, they

should not be classified under a general "basket," such as item 517.91, covering "[a]rticles not specially provided for, of carbon or graphite." "[I]f an article is described in two or more classifications, it is classifiable in the provision which most specifically describes it * * * .'" *United States v. Border Brokerage Co.*, 706 F.2d 1579, 1583, 1 Fed. Cir. (T) 58, 63 (1983) (quoting 19 U.S.C. § 1202, General headnote 10(c) (1976)). However, here the blocks are not described by the more specific category so that the preference does not apply. "The classification of the Customs Service is presumed to be correct and the burden of proof is upon the party challenging its classification." *Simod America Corp. v. United States*, 872 F.2d 1572, 1576, 7 Fed. Cir. (T) ___, ___ (1989) (citing 28 U.S.C. § 2639(a)(1) (1988)). Conceding that the "basket" item describes the blocks, Eastalco has failed to demonstrate that the blocks are entitled to the more specific classification.

In light of the uncontested evidence that the blocks in question have at most a crystalline content of 6% and the admission by Eastalco's expert that this percentage of crystallinity is inconsistent with being labeled "substantially crystalline" in the trade, we cannot find that the court erred, as a matter of law, in finding Eastalco's blocks were not "ceramic articles." Since the blocks are not "ceramic articles," they cannot be classified under item 531.27. The judgment of the Court of International Trade is

AFFIRMED.

Asociacion Colombiana de Exportadores de Flores, plaintiff-appellee, Association of Floral Importers of Florida, Flores del Rio, S.A., et al., plaintiffs *v.* United States, and Floral Trade Council of Davis, California, defendants-appellants

Patrick F.J. MaCrory, Arnold & Porter, of Washington, D.C., argued for plaintiff-appellee. With him on the brief were *Spencer S. Griffith* and *Gwyn F. Murray*.

James R. Cannon, Jr., Stewart & Stewart, of Washington, D.C., argued for defendants-appellants. With him on the brief were *Eugene L. Stewart, Terence P. Stewart* and *Charles A. St. Charles*. *Jeanne E. Davidson*, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants-appellants. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Wendell L. Willkie, II*, General Counsel, *Stephen J. Powell*, Chief Counsel for Import Administration, *Anne White*, Attorney-Advisor, and *Andrea F. Dynes*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Appeal No. 90-1131 and 90-1140

(Decided October 18, 1990)

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MARKEY,* *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and BROWN,** *District Judge*.

FRIEDMAN, *Senior Circuit Judge*.

These appeals present the question of the authority of the Court of International Trade to enjoin the liquidation of entries in the amount specified in an antidumping order where, as a result of litigation before the Court of International Trade, the amount of duty thus specified was reduced but where the party seeking the injunction has not requested an annual review of the amount of the antidumping duty. The Court of International Trade enjoined liquidation at the higher duty. We affirm.

I

A. The procedure for issuing an antidumping duty order comprises three steps involving two separate agencies, the International Trade Administration of the Department of Commerce ("Administration") and the International Trade Commission ("Commission"). *Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1579 (Fed. Cir. 1990). First, the Administration determines whether "foreign merchandise is being, or is likely to be" dumped in the United States, i.e., "sold in the United States at less than its fair value," 19 U.S.C. § 1673(1) (1988). Second, the Commission determines whether "an industry in the United States" is "materially injured" or "threatened with material injury," or "the establishment of an industry in the United States is materially retarded" "by reason of" such imports. 19 U.S.C. § 1673(2). Third, if both of these determinations are adverse to the imported merchandise, the Administration issues an antidumping duty order imposing upon the merchandise "an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673.

Importers of the merchandise the antidumping order covers are required to "deposit * * * estimated antidumping duties pending liquidation of entries of merchandise * * * ." 19 U.S.C. § 1673e(a)(3). "[E]ntries of [such] merchandise * * * shall be liquidated in accordance with the [Administration's] determination" "[u]nless such liquidation is enjoined by the court * * * ." 19 U.S.C. § 1516a(c)(1) (1988). The Administration's regulations provide for automatic liquidation at the cash deposit rate unless an interested party requests review. 19 C.F.R. § 353.53a(d) (1988) (now codified at 19 C.F.R. § 353.22(e)(1) (1990)). Once an entry has been liquidated, the duty paid cannot be recovered even if the payor subsequently prevails in its challenge to the antidumping order. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809-10 (Fed. Cir. 1983).

* Circuit Judge Markey vacated the position of Chief Judge on June 27, 1990.

** Garrett E. Brown, Jr., of the United States District Court for the District of New Jersey, sitting by designation.

Each year, "on the anniversary of the date of publication of a countervailing duty order * * *, if a request for such a review has been received after publication of notice of such review in the Federal Register, [the Administration] shall * * * review, and determine * * * the amount of any antidumping duty * * * ." 19 U.S.C. § 1675(a)(1)(B) (1988). This latter review is called the annual review.

The Administration has a regulation, 19 C.F.R. § 353.53a(d) (1988) (now codified at 19 C.F.R. § 353.22(e)(1) (1990)), which provides that

> if the Secretary does not receive a timely request [for an annual review], the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise * * * at rates equal to the cash deposit of (or bond for) estimated antidumping duties * * * and to continue to collect the cash deposit previously ordered.

The statute provides for review in the Court of International Trade of (1) a "[f]inal affirmative determination" by the Administration or the Commission, 19 U.S.C. § 1516a(a)(2)(B)(i) (1988), and (2) the determination made in an annual review, 19 U.S.C. § 1516a(a)(2)(B)(iii).

The statute further provides that, in connection with review of a final antidumping duty determination, the Court of International Trade "may enjoin the liquidation of some or all entries of merchandise covered by [the] determination * * * upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2).

B. In March 1987, in response to a petition filed by the appellant Floral Trade Council of Davis, California (Council), an association of United States flower growers, the Administration issued an antidumping duty order covering the sales of certain imported flowers from Colombia that the Administration found were made at less than fair value. *Certain Fresh Cut Flowers from Colombia*, 52 Fed. Reg. 6842 (Mar. 5, 1987), *amended*, 52 Fed. Reg. 8492 (Admin. Mar. 18, 1987). For a group of "all other" producers (all but 12 specifically named flower growers), the Administration found that the dumping margin was 4.4 percent and established that amount as the deposit rate.

The final less-than-fair value determination was challenged in the Court of International Trade by both the Council (as being too low), and by an association of producers, exporters and importers of Colombian flowers, the appellee The Asociacion Colombiana de Exportadores de Flores (Asociacion) (as being too high). Both actions were consolidated by that court [No. 87-04-00622]. Although the court upheld the antidumping duty order, the original deposit rate for the "all other" producers was lowered from 4.4 percent to 3.1 percent. *Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114, after remand, 717 F. Supp. 834 (Ct. Int'l Tr. 1989), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990).

On the first anniversary of the antidumping duty order, while the merits of that order were being litigated, a number of Colombian producers

requested the Administration to conduct an administrative review of the rate at which their entries should be liquidated during the annual review period. The Council requested review of six named exporters and producers and of numerous unnamed Colombian producers. The Administration initiated the annual reviews, except for the unnamed producers. Pursuant to 19 C.F.R. § 353.53a(d) (now codified at 19 C.F.R. § 353.22(e)(1)), the Administration ordered the United States Customs Service (Customs) to liquidate all entries for which review had not been requested.

The Council then filed suit in the Court of International Trade challenging the Administration's refusal to initiate reviews of the unnamed producers. The court in June 1988 suspended the liquidation of the first-review period entries while the judicial action was pending, *see Floral Trade Council v. United States*, 692 F. Supp. 1387 (1988), *after remand,* 707 F. Supp. 1343 (Ct. Int'l Tr.), *aff'd*, 888 F.2d 1366 (Fed. Cir. 1989). This suspension of liquidation remained in effect until the Court of International Trade rejected the Council's contentions in February 1989, *see Floral Trade Council*, 707 F. Supp. 1343, and this court affirmed that decision in November 1989, *see Floral Trade Council*, 888 F.2d 1366.

At the same time that the Council obtained the injunction against liquidation, Asociacion sought from the Court of International Trade a temporary restraining order directing Customs to suspend the liquidation of all entries other than those already subject to administrative review. Because the court already had granted the Council's request for the same relief, it denied Asociacion's request for an injunction, but without prejudice to Asociacion's right to reapply to the court for injunctive relief. Order of July 17, 1989 Denying Plaintiff's Motion for an Injunction of Liquidation, CIT Court No. 87-04-00622, at 2.

In October 1989, in anticipation of this court's affirmance in the Council's appeal, the Court of International Trade granted Asociacion's renewed request for an injunction. *Asociacion Colombiana de Exportadores de Flores v. United States*, 724 F. Supp. 969 (Ct. Int'l Tr. 1989). That injunction, which became effective on December 3, 1989, after we affirmed the Court of International Trade in *Floral Trade Council*, 888 F.2d 1366, is the subject of the present appeal. The injunction bars the liquidation of entries for the first review period at the original 4.4 percent rate, which subsequently was reduced to 3.1 percent.

In its opinion granting the injunction, the Court of International Trade first held that Asociacion's failure to seek an annual review for the entries, the liquidation of which it sought to enjoin, did not bar granting the injunction. 724 F. Supp. at 971. The court then held that under the four factors governing the issuance of preliminary injunctions, Asociacion was entitled to an injunction against liquidation of the entries for the period of the first annual review at the 4.4 percent rate specified in the original antidumping order. *Id.* at 971-73.

These factors are that the party seeking the injunction must demonstrate: "(1) that it will be immediately and irreparably injured; (2) that

there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the petitioner." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). The Court of International Trade held that because it had "issued a final judgment sustaining an [Administration] remand determination reflecting lower duty rates than originally ordered," "success on the merits * * * is not an issue." 724 F. Supp. at 971. After reviewing in detail the applicability of the three other factors to this case, the court concluded that there were "at least three factors for injunctive relief strongly in plaintiffs' favor, and one factor at least arguably in their favor." *Id.* at 972.

II

A. The issue is whether a party who challenges in the Court of International Trade an antidumping order is precluded from obtaining an injunction against liquidation of its entries of merchandise made during the year following the antidumping order because it did not request the Administration to conduct an administrative review of the amount of the antidumping duty properly payable during that year.

The appellants rely upon Regulation 353.53a(d) (now codified at 19 C.F.R. § 353.22(e)(1)) which, as noted, provides for liquidation at the deposit rate of all entries made during an annual review period for which no request for an annual review has been made. They contend that the only way the liquidation of the entries made during that annual review period may be stayed is by requesting an annual review, which stays liquidation; and that unless such review is requested and made, the Court of International Trade has no authority to stay the liquidation.

The appellants thus have invoked "the exhaustion-of-administrative-remedies doctrine – that judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point." *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988).

There is a well-settled exception to the exhaustion-of-administrative-remedies doctrine, however, which applies in this case. A party need not exhaust his administrative remedies where invoking such remedies would be futile. *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977) ("Courts will, as a general rule, refuse to require administrative exhaustion when resort to the administrative remedy would be futile, including situations where plaintiffs would be "required to go through obviously useless motions in order to preserve their rights."') (citations omitted). *See also Cooper v. Marsh*, 807 F.2d 988, 990 (Fed. Cir. 1986) (Plaintiff challenging court martial conviction "need seek review only before military tribunals empowered to provide the remedy sought"); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986) (referring to "the futility exception to the exhaustion requirement" and quoting the statement by Professor Davis in 3 K. Davis, *Administrative Law Treaties* § 20.07 (1958), that the exception applies

where "following the administrative remedy would be futile because of certainty of an adverse decision.").

In the present case, it would have been futile for Asociacion to have sought an annual review because the Administration's regulations provide that such review "normally will cover, as appropriate, entries, exports, or sales of the merchandise during the 12 months immediately preceding the most recent anniversary month [the calendar month in which the anniversary of the date of publication of the order or finding occurs]." 19 C.F.R. § 353.53a(b)(1) (1988) (now codified at 19 C.F.R. § 353.22(b)(1) (1990)). Similarly, "[f]or requests received during the first anniversary month after publication of an order or suspension of investigation, the [annual review] will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the month immediately preceding the first anniversary month." 19 C.F.R. § 353.53a(b)(2) (1988) (now codified at 19 C.F.R. § 353.22(b)(2) (1990)). In either situation, the Administration reviews only activity subsequent to the publication of an antidumping order.

The only issue Asociacion raised was the correctness of the dumping margins found in the Administration's original antidumping order. The Administration would not have considered that question in an annual review which, as noted, is limited to "review[ing] and determin[ing] * * * the amount of any antidumping duty * * *" for the review period. 19 U.S.C. § 1675(a)(1)(B).

Since Asociacion never has contended that the amount of antidumping duty for the annual review period should be less than that in the original antidumping order, but only that the latter amount was excessive, Asociacion had no reason to request an annual review and no basis for doing so. Indeed, for Asociacion to have requested an annual review solely to protect its right to seek a judicial injunction against liquidation would have been inconsistent with a major purpose underlying a 1984 amendment of the statute.

Prior to 1984, annual reviews were required for all antidumping orders, whether or not anyone requested such a review. In section 611 of the Trade and Tariff Act of 1984, however, this provision was amended to require an annual review only "if a request for such a review has been received." Pub. L. No. 98-573, tit. VI, § 611(a), 98 Stat. 2948, 3031 (codified at 19 U.S.C. § 1675(a)(1) (1988)). As this court recently noted in *Floral Trade Council v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989), a House Report on the 1984 amendment

> asserted that one purpose for a limitation on reviews was to:
>
>> reduce the administrative burden on the Department of Commerce of automatically reviewing every outstanding order even though circumstances do not warrant it or parties to the case are satisfied with the existing order. The increasing number of out-

standing orders subject to review each year imposes an unnecessarily heavy burden on limited staff resources.

(Citations omitted.)

Requiring Asociacion to have requested an annual review in which the Administration would not consider the only issue that Asociacion was litigating before the Court of International Trade would thwart and defeat that purpose and be inconsistent with a major congressional reason for providing that the Administration need conduct an annual review only if review has been requested.

The appellants' reliance upon Regulation 353.53a(d) is misplaced. As noted, that regulation provides that if no annual review is requested, the entries for that review period will be liquidated at the level specified in the antidumping order but that if such review is sought, liquidation will be stayed until the review is completed.

That regulation, however, is directed to the situation where the parties both accept the dumping order and do not challenge the amount of the antidumping duty. It does not address the different question in the present case, which is whether the failure to request an annual review bars the Court of International Trade, in a suit challenging the Commission's antidumping order, from enjoining liquidation at the amount specified in the antidumping order where that amount has been held excessive and has been reduced.

In the present case, there has already been a definitive determination that the original dumping margin of 4.4 percent was too high, and that the proper original margin should have been 3.1 percent. The government, however, seeks to liquidate the entries for the initial review period at the original, and now erroneous, level of 4.4 percent, solely because Asociacion failed to request an annual review, in which it could not have litigated the validity of that original dumping margin. To permit the government to do so would be unfair to Asociacion. Nothing in the statute even suggests that Congress intended to produce such an inequitable result.

As noted in *Cambridge Lee Indus., Inc. v. United States*, No. 90-1044, also decided today, the Court of International Trade in that case stated that there has been "a continuing split of authority within" that court over "whether a party must request an annual administrative review in order to obtain an injunction against liquidation," and that the conflict "will continue until the Federal Circuit has an opportunity to resolve this issue." *Cambridge Lee Indus., Inc. v. United States*, 723 F. Supp. 1518, 1520 (Ct. Int'l Trade 1989).

We resolve that issue today and hold that the failure of a party who challenges the merits of an antidumping order before the Court of International Trade to have sought an annual review does not preclude that court from enjoining liquidation of entries made during the annual review period at the rate specified in the original antidumping order. Our holding is limited to situations in which the original antidumping order is being challenged in the court suit. We do not question the authority of

the Administration, pursuant to its regulation, to liquidate entries for an annual review period at the rate set in the original antidumping duty order when there has been no challenge to the validity of that order and no request for an annual review.

B. The government contends, however, that the statutory provisions authorizing the Court of International Trade to issue injunctions do not cover this case. According to the government, the court may issue an injunction only (1) against the antidumping order itself, in a proceeding challenging that order, or (2) against liquidation of entries in a proceeding challenging the result of an annual review. The government concludes that in connection with a proceeding challenging the antidumping order itself, the court cannot enjoin liquidation of duties for which an annual review proceeding could have been initiated.

As we have already shown, in an annual review the Administration would not review the only issue that Asociacion raised in its suit: the validity of dumping margins in the original antidumping order. Furthermore, the statutory language does not support the government's narrow construction of it.

The government relies on section 1516a(c)(2), which provides that "[i]n the case of a determination described in [19 U.S.C. § 1516a(a)(2)] by [the Administration], the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of [the Administration], upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." The government contends that the words "covered by a determination of [the Administration]" refer only to (1) a final antidumping duty determination or (2) a determination made in an annual review, and that because the duties for the first annual review period were not within either determination, the court could not enjoin their liquidation.

The flaw in the government's argument is that without a valid antidumping determination in the original order, there can be no valid determination in a later annual review. As the Court of International Trade pointed out in *Sonco Steel Tube Div., Ferrum, Inc. v. United States*, 698 F. Supp. 927, 928 (1989), "[a]n annual review does not have independent existence, it requires a valid underlying order." The statute authorizes the Court of International Trade to enjoin liquidation of entries covered by an Administration antidumping order, the validity of which is being judicially challenged or which has been judicially invalidated.

There is no reason to give the broad statutory language the narrow meaning the government ascribes to it. To the contrary, the statute broadly empowers the Court of International Trade to enjoin liquidations of entries covered by determinations of the Administration. Since the 4.4 percent antidumping duty set in the original antidumping order has now been determined to have been excessive, the statute authorized

the Court of International Trade to enjoin liquidation of entries for the annual review period at that improper rate.

III

The appellants also contend that the Court of International Trade erred in holding that Asociacion met the four-part test for obtaining an injunction. The arguments basically are a reargument of the factual and policy issues presented to that court.

The grant or denial of the type of injunction the Court of International Trade entered in this case lies largely within the discretion of the trial court. *Cf. S.J. Stile Assoc. Ltd. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981). We find it unnecessary to discuss these contentions in detail. We conclude that the Court of International Trade did not abuse its discretion in granting the injunction in this case.

Conclusion

The judgment of the Court of International Trade granting the injunction is

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–99)

DORNIER MEDICAL SYSTEMS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90-02-00094

Defendant moves this Court to dismiss plaintiff's action to recover interest from the Customs Service, claiming the Court lacks jurisdiction because plaintiff did not exhaust its administrative remedies.

Held: Defendant's motion to dismiss is denied because the payment of interest by Customs is not a protestable issue and therefore plaintiff's only recourse is to come before this Court under 28 U.S.C. § 1581(i).

[Defendant's motion to dismiss for lack of jurisdiction denied.]

(Dated October 4, 1990)

Ober, Kaler, Grimes & Shriver (John F. Morkan, III) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); of counsel: *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge*: This case concerns an action by plaintiff, Dornier Medical Systems, Inc. ("Dornier"), to recover interest on a duty refund paid to them by the United States Customs Service ("Customs"). Defendant has filed a motion to dismiss the case pursuant to Rule 12(b) of the rules of this Court, contending the Court lacks jurisdiction over the subject matter because plaintiff failed to exhaust its administrative remedies. Plaintiff counters that it could not have protested Customs' failure to pay interest on the duty refund because the payment or nonpayment of interest is not a protestable issue.

BACKGROUND

The merchandise in issue is known as a lithotripter, which is an apparatus that uses electrical charges to create shock waves that treat kidney stone disease by disintegrating kidney stones within a patient's body. Prior to entry of the goods, Customs classified the lithotripter as an electro-surgical apparatus, under item 709.15, Tariff Schedules of the United States ("TSUS"), and required plaintiff to deposit estimated duty for all the entries. Plaintiff complied, but protested under 19 U.S.C. § 1514(a) (1988), seeking instead to have the lithotripter classified as

"electromedical apparatus, * * * other" under item 709.17, TSUS, which carries a lower rate of duty.

On January 21, 1988, after plaintiff's protests had been filed, Customs granted the protests and reliquidated the entries under item 709.17, TSUS, as requested by plaintiff. In accordance with the reliquidation, Customs refunded to plaintiff the difference between what Dornier initially paid in estimated duties under item 709.15, TSUS, and what Dornier ultimately was found to owe under item 709.17, TSUS. However, Customs did not pay interest on the excess duty. *See* 19 U.S.C. § 1520(d) (1988).[1]

Plaintiff then brought the present action to recover interest on the excess duty paid, invoking the Court's broad residual jurisdiction under 28 U.S.C § 1581(i) (1988). Defendant claims that the Court's jurisdiction under § 1581(i) cannot be invoked because there was another remedy available to Dornier under § 1581(a) which was not manifestly inadequate.

DISCUSSION

As a general rule, challenges to classification, valuation and entry of merchandise are reviewed by this Court pursuant to 28 U.S.C. § 1581(a) after administrative remedies have been exhausted. *United States v. Uniroyal,Inc.*, 69 CCPA 179, 184, 687 F.2d 467, 472 (1982). The Court may exercise its jurisdiction under 28 U.S.C. § 1581(i) only when "the case directly relates to the proper administration and enforcement of an international trade law" and no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. *Norcal/Crosetti Foods. Inc. v. United States Customs Service*, 14 CIT ____, ____, 731 F. Supp. 510, 512 (1990); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *Uniroyal*, 69 CCPA at 184, 687 F.2d at 472. It was not intended that subsection (i) "be used generally to bypass administrative review by meaningful protest." *Uniroyal*, 69 CCPA at 184, 687 F.2d at 472.

Defendant asserts that Dornier should have protested Customs' failure to pay interest by filing another protest under 19 U.S.C. § 1514(a)(5), which specifically provides for protests of reliquidations of entries. Then, if Customs had denied the protest, Dornier could have come before the Court pursuant to 28 U.S.C. § 1581(a). Since subsection (a) provides a remedy, defendant reasons, subsection (i) may not be invoked.

It is fundamental that a protest against a reliquidation must be limited to questions involved in the reliquidation. 19 U.S.C. § 1514(d) (1988); *Computime, Inc. v. United States*, 772 F.2d 874, 877 (Fed. Cir. 1985); *Audiovox Corp. v. United States*, 8 CIT 233, 234, 598 F. Supp. 387, 389 (1984), *aff'd*, 764 F.2d 848 (Fed. Cir. 1985). The Government states that its failure to pay interest was "part of the decision on reliquidation" and

[1]The issue of whether Customs owes interest on the additional duty has not been settled and is currently before the Court in *Kalan,. Inc. v. United States*, Court No. 88-08-00688.

that plaintiff was obligated to protest the reliquidation if it was dissatisfied with any part of the reliquidation decision, including the decision not to pay interest. *Defendant's Reply Brief in Support of Its Motion to Dismiss for Lack of Jurisdiction* at 3. Defendant's approach misses the point. Barring a statement by Customs in the reliquidation decision that it did not intend to pay interest on the refund, the payment or nonpayment of interest by the Government was subsequent to, and not part of, the decision on reliquidation. Since the reliquidation decision did not involve Customs' decision not to pay interest, plaintiff could not have protested the reliquidation on that basis. Interest is a separate issue and in fact is separated statutorily from the reliquidation itself. *Cf.* 19 U.S.C. § 1514 and 19 U.S.C. § 1520(d).

Furthermore, 19 U.S.C. § 1514, which provides for protests of reliquidations, specifically excludes § 1520 from its purview. Section 1514(a) states that the reliquidation of an entry shall be final and conclusive unless a protest is filed, *except* as provided in, *inter alia*, § 1520. 19 U.S.C. § 1514(a) (1988).[2] Therefore, the provisions of § 1514 requiring a protest to be filed prior to bringing suit in this Court do not apply to disputes over the interest pursuant to § 1520.

Section 1520 deals with refunds and errors, such as when Customs initially determines that an item was improperly classified requiring the importer to deposit excess estimated duties with the agency. 19 U.S.C. § 1520(a)(1) (1988). Once Customs decides to reliquidate, § 1520(d) authorizes the payment of interest on the "amount paid as increased or additional duties." There is no provision in § 1520 for administrative protests of the nonpayment of refunds or interest, and because § 1520 is specifically excluded from the scope of 19 U.S.C. § 1514, an importer who seeks to challenge the nonpayment of interest cannot file a protest and has no recourse but to bring suit in this Court.

Since plaintiff could not protest the nonpayment of interest under 19 U.S.C. § 1514, it could not come before the Court under 28 U.S.C. § 1581(a).[3] Moreover, seeing that § 1520 provides no avenues of protest, there were no administrative remedies to exhaust and plaintiff's only recourse was to invoke the Court's residual jurisdiction under § 1581(i). That is precisely the type of situation for which subsection (i) was intended to provide.

Accordingly, the Court finds that jurisdiction was properly invoked by plaintiff under 28 U.S.C. § 1581(i) and defendant's motion to dismiss is denied.

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[2] 19 U.S.C. § 1514(a) states:

> Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), *section 1520 of this title (relating to refunds and errors*, and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> * * * * * * *
>
> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . * * * . (Emphasis added.)

[3] Additionally, plaintiff could not come in under subsections (b)-(h) since none of those subsections is applicable to this matter.

(Slip Op. 90-100)

HOSPITAL CORP. OF AMERICA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90-02-00095

Defendant moves this Court to dismiss plaintiff's action to recover interest from the Customs Service, claiming this Court lacks jurisdiction because plaintiff did not exhaust its administrative remedies.

Held: Defendant's motion to dismiss is denied because the payment of interest by Customs is not a protestable issue and therefore, plaintiff's only recourse is to come before this Court under 28 U.S.C. § 1581(i).

[Defendant's motion to dismiss for lack of jurisdiction denied.]

(Dated October 5, 1990)

Ober, Kaler, Grimes & Shriver (*John F. Morkan., III*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); of counsel: *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge*: This case pertains to an action by plaintiff, Hospital Corporation of America ("HCA"), to recover interest on a duty refund paid by the United States Customs Service ("Customs"). Defendant has petitioned the Court to dismiss the case pursuant to Rule 12(b) of the rules of this Court, contending the Court lacks jurisdiction over the subject matter since plaintiff failed to exhaust its administrative remedies. Plaintiff asserts that it could not have protested Customs' failure to pay interest on the refund because the payment of interest is not a protestable issue.

The merchandise at issue is known as a lithotripter, which is a medical device used in the treatment of kidney stones. Prior to entry of the goods, Customs classified the lithotripter as an electro-surgical apparatus, under item 709.15, Tariff Schedules of the United States ("TSUS"), and required plaintiff to deposit estimated duty for all the entries pursuant to 19 U.S.C. § 1505(c) (1988). Plaintiff complied, but protested the classification under 19 U.S.C. § 1514 (a) (1988), seeking instead to have the goods classified as "electro-medical apparatus, * * * other" under item 709.17, TSUS, which carries a lower rate of duty.

In January 1988, after plaintiff 's protests had been filed, Customs determined that lithotripters should have been classified under item 709.17, TSUS, the classification which plaintiff had sought. Thereafter, Customs granted the protests and reliquidated the entries under item 709.17, TSUS. In accordance with the reliquidation, Customs refunded to plaintiff the difference between what HCA initially paid in estimated duties under item 709.15, TSUS, and what HCA ultimately was found to

owe under item 709.17, TSUS. However, Customs did not pay interest on the excess duty. *See* 19 U.S.C. § 1520(d) (1988).[1]

Plaintiff then brought the present action to recover interest on the excess duty paid, invoking the Court's broad residual jurisdiction under 28 U.S.C § 1581(i) (1988). Defendant claims that the Court's jurisdiction under § 1581(i) cannot be invoked because there was another remedy available to plaintiff under § 1581(a) which was not manifestly inadequate.

As this Court stated in *Dornier Medical Systems, Inc. v. United States*, 14 CIT ____, Slip Op. 90-99 (October 4, 1990), the payment or nonpayment of interest by Customs pursuant to 19 U.S.C. § 1520(d) (1988) is not a protestable issue. Since no protest could be brought, the Court's jurisdiction under 28 U.S.C. 1581(a) could not be triggered. Plaintiff's only recourse, therefore, was to bring suit pursuant to 28 U.S.C. § 1581(i), which grants this Court residual jurisdiction where "the case directly relates to the proper administration and enforcement of an international trade law" and no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 14 CIT ____, ____,731 F. Supp. 510, 512 (1990); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *United States v. Uniroyal*, Inc., 69 CCPA 179, 184, 687 F.2d 467, 472 (1982).

The Court adheres to its ruling in *Dornier* and finds that plaintiff had no recourse but to raise the Court's residual jurisdiction. Hence, jurisdiction under § 1581(i) was properly invoked by plaintiff. Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

(Slip Op. 90–101)

ESWL Limited Partnership, plaintiff *v.* United States, defendant

Court No. 90-02-00096

Defendant moves this Court to dismiss plaintiff's action to recover interest from the Customs Service, claiming this Court lacks jurisdiction because plaintiff did not exhaust its administrative remedies.

Held: Defendant's motion to dismiss is denied because the payment of interest by Customs is not a protestable issue and therefore plaintiff's only recourse is to come before this Court under 28 U.S.C. § 1581(i).

[Defendant's motion to dismiss for lack of jurisdiction denied.]

(Dated October 5, 1990)

Ober, Kaler, Grimes & Shriver (*John F. Morkan III*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. De-

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[1]The issue of whether Customs owes interest on the additional duty has not been settled and is currently before the Court in *Kalan, Inc. v. United States*, Court No. 88-08-00688.

partment of Justice (*James A. Curley*); of counsel: *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge*: This case pertains to an action by plaintiff, ESWL Limited Partnership ("ESWL"), to recover interest on a duty refund paid by the United States Customs Service ("Customs"). Defendant moves this Court, pursuant to Rule 12(b) of the rules of this Court, for an order dismissing this action on the grounds that this court lacks jurisdiction over the subject matter of this action. Plaintiff asserts that it could not have protested Customs' failure to pay interest on the refund because the payment of interest is not a protestable issue.

The merchandise at issue is known as a lithotripter, which is a medical device used in the treatment of kidney stones. Prior to entry of the goods, Customs classified the lithotripter as an electro-surgical apparatus, under item 709.15, Tariff Schedules of the United States ("TSUS"), and required plaintiff to deposit estimated duty for all the entries pursuant to 19 U.S.C. § 1505(c) (1988). Plaintiff complied, but protested the classification under 19 U.S.C. § 1514(a) (1988), seeking instead to have the goods classified as "electro-medical apparatus, * * * other" under item 709.17, TSUS, which carries a lower rate of duty.

In January 1988, after plaintiff's protests had been filed, Customs determined that lithotripters should have been classified under item 709.17, TSUS, the classification which plaintiff had sought. Thereafter, Customs granted the protests and reliquidated the entries under item 709.17, TSUS. In accordance with the reliquidation, Customs refunded to plaintiff the difference between what ESWL initially paid in estimated duties under item 709.15, TSUS, and what ESWL ultimately was found to owe under item 709.17, TSUS. However, Customs did not pay interest on the excess duty. *See* 19 U.S.C. § 1520(d) (1988).[1]

Plaintiff then brought the present action to recover interest on the excess duty paid, invoking the Court's broad residual jurisdiction under 28 U.S.C § 1581(i) (1988). Defendant claims that the Court's jurisdiction under § 1581(i) cannot be invoked because there was another remedy available to plaintiff under § 1581(a) which was not manifestly inadequate.

As this Court stated in *Dornier Medical Systems Inc. v. United States*, 14 CIT ____, Slip Op. 90-99 (October 4, 1990), the payment or nonpayment of interest by Customs pursuant to 19 U.S.C. § 520(d) (1988) is not a protestable issue. Since no protest could be brought, the Court's jurisdiction under 28 U.S.C. § 1581(a) could not be triggered. Plaintiff's only recourse, therefore, was to bring suit pursuant to 28 U.S.C. § 1581(i), which grants this Court residual jurisdiction where "the case directly relates to the proper administration and enforcement of an international trade law" and no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. *Norcal/*

[1] The issue of whether Customs owes interest on the additional duty has not been settled and is currently before the *Court in Kalan. Inc. v. United States*, Court No. 88-08-00688.

Crosetti Foods. Inc. v. United States Customs Service, 14 CIT ____, ____, 731 F. Supp. 510, 512 (1990); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *United States v. Uniroyal, Inc.*, 69 CCPA 179, 184, 687 F.2d 467, 472 (1982).

The Court adheres to its ruling in *Dornier* and finds that plaintiff had no recourse but to raise the Court's residual jurisdiction. Hence, jurisdiction under § 1581(i) was properly invoked by plaintiff. Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

(Slip Op. 90–102)

UNITED STATES, PLAINTIFF *v.* LUN MAY CO., INC., AND AMERICAN MOTORISTS INSURANCE CO, DEFENDANTS

AMERICAN MOTORISTS INSURANCE CO., THIRD-PARTY PLAINTIFF *v.* MAY M. LAM A/K/A HOMAY LAM, THIRD-PARTY DEFENDANT

Court No. 86-04-00433

(Dated October 5, 1990)

ORDER

DICARLO, *Judge*: Upon remand from the United States Court of Appeals for the Federal Circuit in this action, the Court

HEREBY ORDERS that the judgment against American Motorists Insurance Company is vacated,

AND FURTHER ORDERS that, pursuant to Rule 41(a)(2) of the Rules of this Court, the action of the United States is dismissed with prejudice.

(Slip Op. 90–103)

ARIS ISOTONER GLOVES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-06-00866

MEMORANDUM AND ORDER

[On cross-motions as to value of imported dress gloves, partial summary judgment for each side.]

(Decided October 10, 1990)

Donohue and Donohue (*James A. Geraghty*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Saul Davis*) for the defendant.

AQUILINO, *Judge*: This case, which challenges the value of imported dress gloves computed pursuant to section 201 of the Trade Agreements

Act of 1979, 19 U.S.C. § 1401a, is described in the court's slip op. 88-154, 12 CIT ___(Nov. 7, 1988), familiarity with which is presumed.

Before the court at the time were cross-motions for summary judgment, which could not be resolved on the papers submitted in light of the decision in *Texas Apparel Co. v. United States*, 12 CIT , 698 F.Supp. 932 (1988), which was handed down after their filing herein. Hence, this court directed the parties to determine if they could resolve themselves the issues of fact, to which that decision had given rise, before any further, formal proceedings.

Subsequent to slip op. 88-154, however, the plaintiff first appeared as *amicus curiae* in support of the Texas Apparel Co.'s appeal to the U.S. Court of Appeals for the Federal Circuit from the CIT judgment of dismissal. The court of appeals affirmed that judgment, 883 F.2d 66 (1989), whereupon counsel presented a joint petition for a writ of certiorari to the U.S. Supreme Court which has been denied, 110 S.Ct. 728 (1990).

I

Part of plaintiff's motion for summary judgment is a Schedule A, which lists categories encaptioned knitting machines, sewing machines, presses (without dies or drills), knives and cutters, other machines, major machine components, and dies and tools. The parties have now filed a stipulation which states that the following items on that schedule,

> which were furnished free of charge by the plaintiff importer to the foreign manufacturer of the subject imported merchandise, the book values of which were included in the appraised values of said merchandise, are not in the nature of assists within the meaning of 19 U.S.C. section 1402(h)(1)(a) [*sic*], and are not otherwise dutiable, to wit:

Description	*Value*
Fans	$1,000.00
Time clocks	103.75
Wall clocks	348.60
Vacuum cleaners	830.00
Knife sharpener	155.58
Large drill press for making machine tools	1,513.03
Small drill press for making machine tools	302.61
Total	$4,253.57

The effect of this agreement, of course, is that the plaintiff is entitled to judgment providing for refund of any duties paid, based on the value of those articles.

II

Notwithstanding *Texas Apparel*, the plaintiff continues to move for summary judgment as a matter of law as to the remainder of its Schedule

A. It has submitted a supplemental memorandum which concludes (at pages 25-27) as follows:

> * * * [T]he court is not bound by the Federal Circuit's affirmance of *Texas Apparel Co.* since the appellate court misapprehended the extent to which the lower court had considered the dispositive issues. Moreover, the * * * lower court's opinion was flawed in several respects and thereby is not *stare decisis* on the issues in this case.
>
> The *Texas Apparel Co.* court improperly deferred to Customs' interpretation of terms in the appraisement title of the Tariff Act * * * * [A] court should not defer to agency interpretations of revenue statutes since the judicial deference doctrine applies only to regulatory statutes. Although principled well reasoned customs rulings might be persuasive, although not binding, the rulings which express Customs' position in this case were conclusory and lacking in reasoned analysis . * * *
>
> Even if *Chevron* and it[s] progeny were applicable, the conditions warranting deference are not present in this case. By their terms, those decisions require a court to apply a two pronged test before deferring to agency interpretation. First, the court should ascertain congressional intent by applying traditional tools of statutory construction. If that intent can be gleaned from extrinsic aids, legislative history, or intrinsic aids, e.g., *ejusdem generis* and *noscitur a sociis*, the issue is concluded. If not, and the statute is silent or ambiguous, a court should defer to interstitial gap-filling, * * * effected by the agency through interpretation case-by-case. At that point, the court is responsible to determine whether the interpretation is reasonable. The court in *Texas Apparel Co.* [ ] should have acknowledged that the legislative history was silent on the precise issue, but then should have ascertained congressional intent by "employing traditional tools of statutory construction," that is, *ejusdem qeneris* and *noscitur a sociis*. If so, the court would have complied with the *Cardoza - Fonseca* formulation and found no occasion to defer. In other words, the court would never have had to determine whether Customs' interpretation was reasonable.
>
> In the end, Customs' interpretation was unreasonable because it was not based on extrinsic evidence of congressional intent, the application of traditional rules of statutory construction, or on any other principle which might have had persuasive authority. There was no basis whatsoever for applying the broadest possible interpretation to the term "tools" in section 402(h)(1)(A)(ii). Under recognized rules of statutory construction, the term should be limited, and construed in harmony with dies and molds. For this reason too the *Texas Apparel Co.* analysis was flawed and should be rejected.

On its part, the defendant has interposed a motion to strike this memo randum, arguing among other things, that these points "have been extensively briefed to date, and plaintiff was simply out of time when it filed its memorandum of July 20, 1990." In response, the plaintiff admits to a "misunderstanding" as to the time for submissions subsequent to a status conference with the court. Be that as it may, there is no showing that the defendant has been prejudiced by plainiff's timing, and the mo-

tion to strike therefore should be denied. *See generally Jimlar Corp.v. United States*, 10 CIT 671, 647 F.Supp. 932 (1986); *Nuove Industrie Elettriche di Legnano S.p.A. v. United States*, 14 CIT ___,___ 739 F.Supp. 1567, 1570-72 (1990).

Of course, this denial of defendant's procedural motion does not necessarily mean that its position on the merits, as set forth in its cross-motion for summary judgment, is without substance. This court was not privy to the proceedings in *Texas Apparel*, but plaintiff's counsel herein apparently were, at least at the appellate level, and it seems quite unlikely that the arguments quoted at length above have not already been pressed in the higher courts. Indeed, the issues raised in the certiorari petition were reported as follows:

> * * * (1) Does judicial deference doctrine restated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 * * * (1984), and refined in *INS v. Cardoza-Fonseca*, 480 U.S. 421 * * * (1987), apply to substantive revenue statutes? (2) Should * * * U.S. Court of International Trade defer to agency interpretation of statutes within court's subject matter jurisdiction? (3) Does judicial deference doctrine extend to pure questions of statutory construction as inferred by U.S. Court of Appeals for Federal Circuit in this case, or only to agency construction of statutes as applied to specific facts, as stated by, *inter alia*, U.S. Court of Appeals for District of Columbla *Circuit in Union of Concerned Scientists v. U.S. NRC, 824 F2d 108* * * * (CA DC 1987), and *International Union UAW v. Brock*, 816 F2d 761 (CA DC 1987)?

58 U.S.L.W. 3400 (Dec. 19, 1989). On the other hand, even if plaintiff's arguments are being articulated for the first time now, they do not convince this court that either *ejusdem generis* or *noscitur a sociis* supplants *stare decisis*.

Clearly, the reasoning in *Texas Apparel* went beyond mere deference to the Customs Service. The court examination in that case of the legislative history of the Trade Agreements Act "reveal[ed] that Congress did not intend as narrow or restrictive a view of computed value, or of the term 'assist,' as suggested by plaintiff." 12 CIT at ___, 698 F.Supp. at 935. The court agreed that there is a distinction between

> machinery which works directly on the merchandise or contributes directly to its manufacture, e.g., sewing machines, drill presses and ovens, and machinery which although used by the industry is not used directly in the production of the merchandise itself, e.g., airconditioners and emergency generators.

12 CIT at ___, 698 F.Supp. at 936. And the court found that

> the function performed by the sewing machines, which is to construct the apparel by sewing together the fabric, is essentially or principally the same as that of a tool, die, or mold. Although a tool may be defined as plaintiff suggests, as a manual instrument, a tool may also be defined more broadly as "an implement or object used in performing an operation or carrying on work of any kind * * *" *See*

> *Websters Third New International Dictionary* 2408 (1981). It is clear, therefore, that in this industry a sewing machine is a device similar to a "tool, die, [or] mold * * * used in the production of the imported merchandise."

12 CIT at ____, 698 F.Supp. at 937 (brackets in original).

Following this reasoning, this court is unable to conclude that the term "tools" found in the statutory definition of "assist", 19 U.S.C. § 1401a(h)(1)(A), cannot encompass "machine" tools. Of course, this does not mean that such tools, whatever their individual degrees of sophistication, are used "directly" in the production of merchandise. Hence, for example, the plaintiff is entitled to recovery as to the large and small drill presses listed above but not as to the "Glove die - used in presses for cutting material", plaintiff's Exhibit 1.

Judgment will enter accordingly, with defendant's motion to strike denied. So ordered.

(Slip Op. 90–104)

KEJRIWAL IRON AND STEEL WORKS, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT and ALHAMBRA FOUNDRY CO., ET AL., DEFENDANT-INTERVENORS

Court No. 89-04-00172

[Remand determination affirmed; action dismissed.]

(Decided October 11, 1990)

Kaplan Russin & Vecchi (*Dennis James Jr.* and *Kathleen F. Patterson*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*A. David Lafer*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Andrea Fekkes Dynes*), for defendant.

Collier Shannon & Scott (*Paul C. Rosenthal* and *Carol A. Mitchell*), for defendant-intervenor.

DICARLO, *Judge*: Defendant-intervenors challenge the amended results of the remand ordered in *Kejriwal Iron & Steel Works Ltd. v. United States*, 14 CIT ____, 729 F. Supp. 1365 (1990) (*Kejriwal I*). In *Kejriwal I*, the United States Department of Commerce, International Trade Administration was directed to: 1) correct computer input errors, 2) correct its failure to deduct several Indian taxes from the calculation of constructed value, 3) either explain how it arrived at the tonnage figures used to calculate the rebate provided under India's International Price Reimbursement Scheme (IPRS) or recalculate the rebate and explain why its new methodology is in accordance with law and supported by substantial evidence on the record, and 4) correct the double counting of interest expenses in the calculation of foreign market value. Upon review of the amended remand results, the Court finds them to be in accordance with law and supported by substantial evidence.

BACKGROUND

Kejriwal challenged an antidumping order against imports of iron construction castings it manufactured in India. *See Certain Iron Construc-*

tion Castings From India: Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance With Decision Upon Remand, 54 Fed. Reg. 11,989 (March 23, 1989) (finding a 2.93 percent margin for Kejriwal). Initially, Commerce found Kejriwal had a *de minimis* margin and excluded it from the antidumping duty order. As a result of the remands ordered in *Alhambra Foundry Co. v. United States*, 12 CIT ___, 685 F. Supp. 1252 (1988) and *Alhambra Foundry Co. v. United States*, 12 CIT ___, 701 F. Supp. 221 (1988), Kejriwal was included in the amended antidumping duty order.

Discussion

In the amended remand results, Commerce concluded that Kejriwal has a *de minimis* margin. Plaintiff has raised no objection to this conclusion. Defendant-intervenors raise several objections to the recalculation of the IPRS rebates . The IPRS is an Indian governmental program to compensate Indian producers for their higher than world-market cost for domestic pig-iron. *See Alhambra*, 12 CIT at ___, 685 F. Supp. at 1255. No objections have been raised regarding the other issues Commerce was directed to reconsider on remand. Accordingly, those aspects of the remand results are affirmed.

In *Kejriwal I*, plaintiff argued Commerce improperly understated its IPRS payment in its calculation of constructed value, thereby inflating the dumping margin. *Kejriwal I*, 14 CIT at ___, 729 F. Supp. at 1369. Commerce countered that the adjustment to constructed value for rebates was limited to rebates earned during the period under investigation. *Id.* Commerce's explanation appeared to create a conflict between the tonnage data it used to calculate IPRS rebates and its tonnage data for total raw materials purchased. It appeared that IPRS rebates were paid for an amount of pig-iron greater than Kejriwal claimed to have purchased. Consequently, the Court ordered Commerce to either explain why its calculation was in accordance with law and supported by substantial evidence or to recalculate the IPRS payments and explain why its new methodology is in accordance with law and supported by substantial evidence. *Id.* at ___, 729 F. Supp. at 1369-70.

The difference between the amount of pig-iron purchased and the amount earning rebates is explained by the fact that data for pig-iron purchased was based on total casting production while the rebate data was based on exported castings. Production and export statistics differ because castings may be exported from inventory or not exported. The tonnage figure Commerce used came from a verified IPRS payment summary document. *See* Conf.R. Kejriwal 44A, 46A (Exhibit 11). According to Commerce, the summary document is "the most appropriate basis for calculating the IPRS rebate rate, since it relates actual IPRS rebates to the pig-iron purchases for which they were claimed." Amended Remand Results, at 15. This reasoning and the evidence in the record is sufficient to account for the difference between the figures used to calculate the IPRS payments and production costs.

Nevertheless, Commerce determined it had incorrectly calculated the IPRS rebate. The rebate is only earned on pig-iron purchased from domestic suppliers and then exported. Commerce, however, calculated the rebate for all the pig-iron purchased to produce castings for export. This methodology failed to account for pig-iron wasted in the production process and, therefore, not exported. To correct this error, Commerce adjusted the IPRS rebate to equal the rebate earned on exported pig-iron. According to Commerce, this figure is properly treated as an offset to material costs.

Defendant-intervenors object that the adjustment results in an unverified derived figure for export tonnage that is unsupported by any evidence in the record. The production input tonnage data was taken from a verified IPRS Summary Sheet . *See* Kejriwal Verification Exhibit 11 (Conf.R. 46A). The amount of wastage is supported by substantial evidence in the record . *See* Conf. R. 456A, 778A. Consequently, the Court finds Commerce's calculation of the IPRS rebate to be in accordance with law and supported by substantial evidence.

In addition, the Court notes defendant-intervenors' objection is directed at an adjustment reducing the IPRS rebate and increasing constructed value. The adjustment, therefore, favors the defendant-intervenors by increasing the dumping margin.

Defendant-intervenors raise further objections based on numerous examples of calculations using tonnage data that are allegedly inconsistent with the export tonnage data used to calculate IPRS rebates. The only change in the IPRS portion of the constructed value calculation made during the remand was the adjustment for wastage in the production process. Therefore, the "inconsistencies" defendant-intervenors now raise were present prior to the conclusion of the remand and could have been raised before the administrative agency. As defendant-intervenors have failed to exhaust their administrative remedies, these objections are untimely. *See Rhone Poulenc Inc. v. United States*, 899 F.2d 1185, 1191, *reh'g denied* 1990 U.S. App. LEXIS 6258 (Fed. Cir. 1990); *Sharp Corp. v. United States*, 6 Fed. Cir. (T) 63, 67, 837 F.2d 1058, 1062 (Fed. Cir. 1988).

Without ruling on these arguments, but for purposes of example, one of defendant-intervenors' arguments is that the constructed value calculation is flawed because the export tonnage data Commerce used to calculate the per-ton IPRS rebate rate is not consistent with the tonnage data used to calculate the rebate Kejriwal received under India's Cash Compensatory Support (CCS) program. Through the CCS program, the Indian government refunds certain domestic taxes paid on items subsequently exported. *Kejriwal I*, 14 CIT at ___, 729 F. Supp. at 1368.

According to defendant-intervenors, both calculations relate to the same merchandise and, therefore, both calculations should have used the same tonnage data. The plaintiff justifies the difference by explaining that, unlike the IPRS rebate, the CCS rebate was calculated from data for sales rather than exports. According to plaintiff, the result would be "vir-

tually the same" had the calculation been done using export data. Plaintiff's Reply to Defendant-Intervenors' Comments on the Commerce Department's Final Remand Results, 8. The government agrees adding that "the basis of the [CCS] rebate is known at the time of sale, does not vary between sale and export, and is based upon the sales price * * * ." Defendant's Memorandum In Response to Plaintiff's and Defendant-Intervenors' Comments on the Final Remand Results, 14. The government concludes "[i]t would have been inappropriate to allocate either the IPRS or the CCS rebate upon the basis of a tonnage which was not the basis upon which the rebate was given." *Id.* at 15.

The explanations for the use of differing data do not appear to be unreasonable. Nevertheless, as stated above, these objections have not been raised in a timely manner. Accordingly, the Court does not pass on their merits.

Defendant-intervenors raise two final arguments that are also untimely. First, the remand calculation of the IPRS rebate rate is improper because it was based on shipments rather than sales, and second, Commerce should have adjusted constructed value to account for variations in the price of castings. Despite the fact that these issues were present during the remand and defendantintervenor had the opportunity to raise them, defendant-intervenor failed to raised them before Commerce. Accordingly, the Court will not consider their merits.

CONCLUSION

Upon review of the amended remand results, the Court finds Commerce's determination that Kejriwal had a *de minimis* dumping margin is in accordance with law and supported by substantial evidence on the record. Accordingly, the amended remand results are affirmed and the action is dismissed.

(Slip Op. 90–105)

SCHUMPERT MEDICAL CENTER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90-02-00097

Defendant moves to dismiss plaintiff's action to recover interest from the Customs Service, claiming this Court lacks jurisdiction because plaintiff did not exhaust its administrative remedies.

Held: Defendant's motion to dismiss is denied because the payment of interest by Customs is not a protestable issue and therefore plaintiff's only recourse is to come before this Court under 28 U.S.C. § 1581(i).

[Defendant's motion to dismiss for lack of jurisdiction denied.]

(Dated October 12, 1990)

Ober, Kaler, Grimes & Shriver (*John F. Morkan III*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. De-

partment of Justice (*James A. Curley*); of counsel: *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge*: This case pertains to an action by plaintiff, Schumpert Medical Center, Inc. ("Schumpert"), to recover interest on a duty refund paid by the United States Customs Service ("Customs"). Defendant moves this court, pursuant to Rule 12(b) of the rules of this Court, for an order dismissing this action on the grounds that this court lacks jurisdiction over the subject matter of this action. Plaintiff asserts that it could not have protested Customs' failure to pay interest on the refund because the payment of interest is not a protestable issue.

The merchandise at issue is known as a lithotripter, which is a medical device used in the treatment of kidney stones. Prior to entry of the goods, Customs classified the lithotripter as an electro-surgical apparatus, under item 709.15, Tariff Schedules of the United States ("TSUS"), and required plaintiff to deposit estimated duty for all the entries. In order to have its merchandise released, plaintiff complied but protested the classification under 19 U.S.C. § 1514(a) (1988), seeking instead to have the goods classified as "electro-medical apparatus, * * * other" under item 709.17, TSUS, which carries a lower rate of duty.

In January 1988, after plaintiff's protests had been filed, Customs determined that lithotripters should have been classified under item 709.17, TSUS, the classification which plaintiff had sought. Thereafter, Customs granted the protests and reliquidated the entries under item 709.17, TSUS. In accordance with the reliquidation, Customs refunded to plaintiff the difference between what Schumpert initially paid in estimated duties under item 709.15, TSUS, and what Schumpert ultimately was found to owe under item 709.17, TSUS. However, Customs did not pay interest on the excess duty. See 19 U.S.C. § 1520(d) (1988).[1]

Plaintiff then brought the present action to recover interest on the excess duty paid, invoking the Court's broad residual jurisdiction under 28 U.S.C § 1581(i) (1988). Defendant claims that the Court's jurisdiction under § 1581(i) cannot be invoked because there was another remedy available to plaintiff under § 1581(a) which was not manifestly inadequate.

As this Court stated in *Dornier Medical Systems. Inc. v. United States*, 14 CIT ____, Slip Op. 90-99 (October 4, 1990), the payment or nonpayment of interest by Customs pursuant to 19 U.S.C. § 1520(d) (1988) is not a protestable issue. Since no protest could be brought, the Court's jurisdiction under 28 U.S.C. § 1581(a) could not be triggered. Plaintiff's only recourse, therefore, was to bring suit pursuant to 28 U.S.C. § 1581(i), which grants this Court residual jurisdiction where "the case directly relates to the proper administration and enforcement of an international

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[1] The issue of whether Customs owes interest on the additional duty has not been settled and is currently before the Court in Kalan. Inc. v. United States, Court No. 88-08-00638.

[2] *See also Hospital Corporation of America v. United States*, 14 CIT ____, Slip Op. 90-100 (October 5, 1990) and *ESWL Limited Partnership v. United States of America*, 14 CIT ____, Slip Op. 90-101 (October 5, 1990).

trade law" and no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. Norcal/ *Crosetti Foods. Inc. v. United States Customs Service*, 14 CIT ____, ____, 731 F. Supp. 510, 512 (1990); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *United States v. Uniroyal. Inc.*, 69 CCPA 179, 184, 687 F.2d 467, 472 (1982).

The Court adheres to its ruling in *Dornier* and its companion cases[2], and finds that plaintiff had no recourse but to raise the Court's residual jurisdiction. Hence, jurisdiction under § 1581(i) was properly invoked by plaintiff. Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

(Slip Op. 90–106)

NORCAL/CROSETTI FOODS, INC., PATTERSON FROZEN FOODS, INC. AND RICHARD A. SHAW, INC., EACH CALIFORNIA CORPORATIONS, PLANTIFFS *v.* U.S. CUSTOMS SERVICE, U.S. DEPARTMENT OF THE TREASURY, HON. NICHOLAS BRADY, SECRETARY OF THE TREASURY, JOHN DURANT, DIRECTOR OF COMMERCIAL RULINGS DIVISION FOR U.S. CUSTOMS SERVICE, AND HOWARD B. FOX, DIRECTOR OF OFFICE OF REGULATIONS AND RULINGS OF THE U.S. CUSTOMS SERVICE, DEFENDENTS, COVEMEX, S.A. DE C.V., MAR BRAN, S. DE R.L. DE C.V., EXPOHORT, S.A. DE C.V., VEGETALES CONGELADOS, S. DE P.R., AND CONGELADOS DON JOSE, S.A. DE C.V., APPLICANTS FOR INTERVENTION

Court No. 89-09-00495

Applicants seek to intervene as defendant-intervenors.

Held: Applicants' motion is untimely as the proceedings have entered their substantive phase and are close to final resolution.

[Applicants' motion for intervention is denied. Applicants may file amicus curiae brief]

(Dated October 15, 1990)

Brownstein Zeidman and Schomer, (*Irwin P. Altschuler, Donald P. Stein*) for applicants.

Titchell Maltzman Mark Bass Ohleyer and Mishel (*Robert Ted Parker*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Susan Burnett Mansfield*), for defendants.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge*: Covemex, S.A. de C.V., Mar Bran, S.A. de R.L. de C.V., Expohort, S.A. de C.V., Vegetales Congelados, S. de P.R., and Congelados Don Jose, S.A. de C.V. (collectively, "Covemex"), filed its motion to intervene as of right pursuant to C.I.T. Rule 24(a)(2) on September 18, 1990. As discussed below, its motion is untimely and Covemex is invited to participate as *amicus curiae* pursuant to C.I.T. Rule 76. Covemex's motion in the alternative for permissive intervention under C.I.T. Rule 24(b)(2) is also denied as untimely.

Covemex's motion to intervene presents several issues:

1. Whether the motion is timely;
2. Whether, and to what extent the parties to the case may be prejudiced by intervention,
   a. due to delays for extra briefing,
   b. due to delays for pleading in conformance with the Court rules on intervention;
3. Whether Covemex would be prejudiced if not allowed to intervene;
4. Whether Covemex may intervene permissively; and,
5. Whether Covemex has standing to intervene.

The requirements for intervention as of right under C.I.T. Rule 24(a)(2) are identical to those under Rule 24(a)(2) of the Federal Rules of Civil Procedure (F.R.C.P.).[1] Therefore, cases construing the F.R.C.P. may be consulted when construing the Rules of this Court.[2]

The timeliness of an application for intervention must be evaluated in light of the totality of the circumstances before the court.[3] *Donovan v. United Steelworkers of America*,[4] instructs that courts should look at: "(1) the stage of the proceedings when the movant seeks to intervene; (2) possible prejudice caused to the other parties by delay; and (3) the reason for the delay."[5] In *Donovan*, the appellant/intervenor sought to intervene more than thirteen months after the complaint had been filed, after all pre-trial work was completed and the case was scheduled for trial. The district court denied the motion for intervention as untimely.

The *Donovan* district court found that substantial prejudice could result to the other parties if intervention was allowed, due to delays in the proceedings arising from intervention by a new party. Furthermore, the excuses given by the appellant/intervenor were unpersuasive, and "resemble[d] evidence of tactical decisions.* * *"[6]

Walker v. Jim Dandy[7], cited by Covemex, enumerates criteria for evaluating the timeliness of a motion to intervene:

a. How long did the would-be intervenor know (or reasonably should have known) of his or her interest in the case before he or she petitioned for leave to intervene;

b. The degree of prejudice to the existing parties as a result of his or her failure to intervene sooner;

c. The extent of prejudice to the would-be intervenor if the motion is denied; and,

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[1] *Vivitar Corp. v. United States*, 7 C.I.T. 165, 166-167, 585 F.Supp. 1415 (1984).

[2] *Vivitar Corp. v. United States*, 7 C.I.T. at 166.

[3] *Farmland Dairies v. Commissioner of the N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1044 (2nd Cir. 1988).

[4] *Donovan v. United Steelworkers of Am.*, 721 F.2d 126 (4th Cir.), cert. den. 467 U.S. 1252, 104 S.Ct. 3535 (1984).

[5] *Donovan v. United Steelworkers of Am.*, 721 F.2d at 127.

[6] *Donovan v. United Steelworkers of Am.*, 721 F.2d at 127.

[7] *Walker v. Jim Dandy Co.*, 747 F.2d 1360 (11th Cir. 1984).

d. any unusual circumstances militating either way concerning the timeliness of the motion.[8]

These criteria apply both to intervention as of right and permissive intervention, and they must be considered when timeliness of the motion is at issue.[9]

Applying these criteria to the facts in this case, the Court finds that the motion to intervene is untimely.

Covemex's motion to intervene comes long after it learned of this case. Covemex has been aware of this dispute since September 1988, when it apparently filed comments with the Customs Service defending the current country of origin marking requirements with respect to frozen vegetables. Covemex Brief, at 3. Five months later, Plaintiffs filed their complaint. Presumably, Covemex has followed the initial proceedings in this Court. Yet Covemex gives no reason or excuse why it waited eighteen months after the complaint was filed to intervene.

Covemex's only reason for not intervening sooner is that procedural and jurisdictional issues were being decided "which would have [had] little direct impact" on them. Covemex Brief, at 4. But these "issues" included accelerated scheduling of the briefing, which demonstrated this Court's interest in a quick resolution of the matter. Plaintiff has already filed its motion for summary judgment. Pre-trial work is almost complete and the case is close to final disposition.

This reason is unconvincing, and resembles a tactical decision by Covemex to reduce its costs protecting its perceived stake in the case.[10] Covemex could have easily intervened at the outset of the case, and joined in both the jurisdictional disputes and the scheduling of the briefing of the rest of the case, at little expense to itself. Had Covemex participated in the initial stages of the case, it would have been aware of the Court's desire to resolve this case with deliberate speed. Covemex chose not to, and moves to intervene now that the case is close to decision.

The other parties to the case may also be prejudiced if Covemex is allowed to intervene. *Spring Construction Co. v. United States*[11], cited by Covemex at p. 5 of its brief, holds that the most important consideration should be whether the delay in applying to intervene has prejudiced the other parties.

Prejudice to the existing parties is perhaps the most important factor in determining timeliness of a motion to intervene.[12] The parties to the case could be and likely would be prejudiced if Covemex's motion were granted. Covemex gives no reason to believe that they would comply with the briefing schedule, other than a conclusory statement that granting the motion to intervene would not cause any delay in the established

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8 *Walker v. Jim Dandy Co.*, 747 F.2d at 1365-66.

9 *Walker v. Jim Dandy Co.*, 747 F.2d at 1365-66.

10 *Donovan v. United Steelworkers of Am.*, 721 F.2d at 127.

11 *Spring Construction Co. v. United States*, 614 F.2d 694, 701 (4th Cir. 1980).

12 *Vivitar Corp. v. United States*, 7 C.I.T. at 166-67.

briefing schedule. Covemex Brief, at 4. Presumably, Covemex means that it would not seek to extend the briefing schedule, but it does not say so.

In addition, Covemex has not complied with Rule 24(c)[13] of this Court, which requires a "pleading" setting forth the intervenor's claims. Covemex has not supplied any motion or other pleading explaining its claims, other than a memorandum of points and authorities in support of its motion for intervention, which does not suffice as a "pleading" within the meaning of Rule 24(c). As Plaintiffs point out, "[o]nly if "the alleged defect in the pleading is adequately cured without prejudice to the party opposing intervention,' will noncompliance with "the strict requirements' of Rule 24(c) be forgiven."[14] The Court finds that plaintiffs would be prejudiced by intervention due to the delay necessary for compliance with Rule 24(c).

County of Orange v. Air California[15] emphasized the "seriousness of prejudice which results when relief from longstanding inequities is delayed" by allowing intervention at a late stage in the proceedings.[16] In that case appellant attempted intervention after a settlement had been reached between the parties. The district court stated that allowing intervention would be the undoing of five years of protracted litigation finally resolved by stipulated judgment.[17]

Although this dispute fortunately has not taken five years to reach its present phase, it is now close to resolution. Intervention by Covemex would almost inevitably delay the proceedings in one way or another. The existing parties would likely be prejudiced by the added arguments and bries of Covemex, as well as any possible motions to extend time for briefing or discovery which might arise. If Covemex were allowed to intervene at this point in the case, after Plaintiff's Motion for Summary Judgment has already been filed, and only days before the filing deadline for Defendant's reply brief, final consideration of the substantive issues now before the Court would almost certainly be slowed.

This Court is charged by Rule 1 of the Rules of Court, to construe the Rules "to secure the just, speedy, and inexpensive determination of every action."[18] As stated above, plaintiff's complaint was filed a year and a half ago. Covemex had a considerable period of time to intervene, but chose not to.

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[13] Rule 24(c) states in full:

(c) PROCEDURE

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and *shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought*. The same procedure shall be followed when a statute of the United Shtes gives a right to intervene.

C.I.T. Rule 24(c), (as amended 1988) (emphasis added).

[14] Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Intervene, at 4, citing *Ceramica Regiornontana, S.A. v. United States*, 7 C.I.T. 390, 393, 590 F.Supp. 1260 (C.I.T. 1984).

[15] *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), cert. den. *Irvine v. County of Orange*, 480 U.S. 946, 94 L. Ed. 2d 791, 107 S. Ct. 1605, 55 U.S.L.W. 3661 (1987).

[16] *Id.*

[17] *Id.*

[18] U.S.C.I.T. Rule 1, as amended 1985; see also Manuli Autoadesivi, *S.p.A. v. United States*, 9 C.I.T. 24, 26-27, 602 F.Supp. 96 (C.I.T. 1985).

The court has set an accelerated schedule for this case and does not wish to jeopardize its efforts to navigate this case between the shoals of government bureaucracy and neglect so that an outsider sitting on the shore may come on board the case when it considers advantageous to do so. It is too late in the day for this Court to allow Covemex to intervene as a party to the case. Covemex had its chance earlier on, but missed it.

Covemex has not adequately shown that it would be prejudiced by the result in this case if they are not allowed to participate as parties to the action. However, in order to allow its arguments to be heard, Covemex is invited to file an *amicus curiae* brief under Rule 76 of this court. Therefore, the Court cannot perceive how denying the motion for intervention harms Covemex.

Covemex's motion in the alternative for permissive intervention is also denied as untimely.

In light of the above, the Court need not address the issue whether Covemex, a group of foreign producers and/or packagers of frozen vegetables, has standing to intervene. On its face, 28 U.S.C. § 2631, makes clear that an action concerning marking requirements commenced under 28 U.S.C. § 1581(h)(1990), can be maintained by any person who would have had standing if the goods had been imported and a protest had been filed and denied. The Court notes without deciding the issue that the apparent intent of Congress in establishing the present standing requirement was to allow foreigners to come before the Court.[19]

(Slip Op. 90–107)

CERAMICA REGIOMONTANA, S.A., CERAMICAS Y PISOS DE CULIACAN, S.A. DE C.V., AND INDUSTRIAS INTERCONTINENTAL, S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 88-05-00394

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion to amend complaint to take into account decision of the Court of Appeals for the Federal Circuit, rendered after the complaint was filed, is granted.]

(Dated October 17, 1990)

Brownstein Zeidman and Schomer (*Steven P. Kersner, Ronald M. Wisla*), for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*), for the defendant.

[19]DeConcini, Introductory Statement to the International Trade Symposium, 26 N.Y.L.S.L. Rev. 431, 434 (1981)(notes that by expanding the concept of standing, the Customs Court Act of 1980 offers the international trade community, domestic interests and consumer groups, among others, an improved forum for the litigation of international trade disputes); see also, Gerhardt, Judicial Review of Customs Service Actions, 9 L. & Pol'y Int'l Bus. 1101, 1165-66 (1977) (foreign suppliers should have means for challenging Customs Service decisions).

BACKGROUND

MUSGRAVE, *Judge*: In a complaint filed at the outset of this action, plaintiff challenges several aspects of a final administrative review by the Department of Commerce ("Commerce") of an outstanding affirmative countervailing duty determination and order covering imports into the United States of ceramic tile from Mexico.[1] Plaintiff now moves for leave to amend its complaint by adding a challenge of the methodology used by Commerce to calculate a country-wide countervailing duty assessment rate applicable to imports of the subject merchandise into this country by the plaintiff between July 1, 1984 and December 31, 1985. Plaintiff seeks to argue that the methodology has been rendered impermissible by a decision of the Court of Appeals for the Federal Circuit in *IPSCO, Inc. and IPSCO Steel, Inc. v. United States*, 899 F.2d 1192 (1990) issued after the initiation of the present action. Defendant opposes the motion. In calculating the country-wide countervailing duty rate in this case, Commerce, pursuant to its past practice, excluded from the calculation data on exports of Mexican firms that were found to have received no subsidy benefits or *de minimis* benefits. Plaintiff's present complaint contains two counts contesting the propriety of the imposition of countervailing duties on the subject merchandise absent an affirmative injury determination by the International Trade Commission. After the complaint was filed, the C.A.F.C. rendered its decision in *IPSCO*, which decision, plaintiff contends, renders invalid Commerce's exclsion from its calculations of the firms that received no or *de minimis* benefits. In the present motion, plaintiff seeks to add to its complaint a third count consisting of four paragraphs, three substantive, challenging the exclusion, and one that incorporates by reference into the third count all previous paragraphs in the first two counts. Defendant opposes plaintiff's motion, arguing first that plaintiff failed to exhaust its administrative remedies by not contesting the exclusion before the agency, and second, that the holding of the C.A.F.C. in *IPSCO* is not applicable retroactively to the entries at issue in this case.

DISCUSSION

This motion and the parties' arguments raise three principal issues: the permissibility generally of amending a previously filed complaint; the matter of exhaustion of remedies; and the question of the retroactivity of the *IPSCO* decision. Rule 15(a) of this Court provides that leave to amend a pleading after a response thereto has been filed "shall be freely given when justice so requires." Construing Rule 15(a) of the Federal Rules of Civil Procedure which contains this identical language, the United States Supreme Court stated,

> [T]his mandate is to be heeded. * * * If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In

[1] The final review is published at 53 Fed. Reg. 15,090 (April 27, 1988). Plaintiff filed its complaint with this Court on June 10, 1988.

> the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on behalf of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). While the Court acknowledged that the decision whether or not to grant such leave is within the discretion of the trial court, the emphasis with which it stated the above principle suggests that statement is to be substantially heeded. This Court too has recognized that leniency is generally to be afforded in deciding whether to allow amendment of a complaint. *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). There has been no allegation or showing of bad faith or lack of due diligence on the part of plaintiff in requesting leave to amend its complaint. *Ceteris paribus*, then, the language of Rule 15(a) and the above decisions suggest that plaintiff's request should be granted. In its opposition, however, defendant raises the issue of exhaustion of administrative remedies and the question as to whether the *IPSCO* decision is applicable in this action.

It is a general rule that a party aggrieved by an agency decision or action must exhaust its remedies for relief on that issue at the agency level before it may contest the decision or action before a reviewing court. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). That rule is not, however, absolute or inflexible. Paragraph (d) of 28 U.S.C. § 2637 provides that this Court "shall, where appropriate, require the exhaustion of administrative remedies." Thus, exhaustion is required not absolutely but when such a requirement is "appropriate". *See, e.g.,Kejriwal Iron & Steel Works, Ltd. v. United States*, 14 CIT___, ___, 729 F. Supp. 1365, 1368 (1990). Concomitantly, the exhaustion requirement is not jurisdictional in nature. *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987). In determining whether it would be appropriate to require exhaustion in a given instance (or more accurately, to refuse to allow a party to raise an issue not raised before the agency) courts "must resist inflexible applications of the doctrine—characteristic of jurisdictional rules which frustrate the ability to apply exceptions developed to cover 'exceptional cases or particular circumstances * * * where injustice might otherwise result' if it were strictly applied." *Al Tech*, 11 CIT at 377, 661 F. Supp. at 1210 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Courts have recognized an exception to the exhaustion doctrine in circumstances suggesting that requiring exhaustion "would be futile or an insistence on a useless formality." *See Rhone Poulenc*, 7 CIT at 135, 583 F. Supp. at 610. Similarly, this Court has not required plaintiffs to pursue courses of action which appear unlikely to produce relief or which represent "manifestly inadequate" remedies. One of the "exceptional cases or particular circumstances" enumerated by the Supreme Court in *Hormel* is the situation "in which there have been judicial interpretations of ex-

isting law after decision below and pending appeal—interpretations which if applied *might* have materially altered the result." 312 U.S. at 558-59 (footnote omitted; emphasis added). In that case, after the lower court had issued the decision under review, the Supreme Court had rendered a decision dispositive of the issue raised before it on appeal; accordingly, it considered the new issue on appeal notwithstanding the absence of exhaustion of administrative remedies on the question. Pursuant to that exception, this Court too has shown an unwillingness to apply the exhaustion doctrine when the issue sought to be raised before the Court arises from a judicial decision rendered after the agency action or determination under review. *See, e.g. Timken Co. v. United States, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986); Alhambra Foundry Co., Ltd. v. United States, 12 CIT,____, ____, 685 F. Supp. 1252, 1256 (1988) (citing United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 544 F. Supp. 883, *aff'd* 69 CCPA 172, 683 F.2d 399 (1982)). Such is the situation presented in this case by the intervening C.A.F.C. decision in *IPSCO*, and under the above precedent the Court finds that the exhaustion requirement is therefore inapplicable in these circumstances to plaintiff's claim regarding the exclusion from Commerce's calculations of nonbenefitting or *de minimis* companies.

Defendant does not contest this exception, but rather argues that the C.A.F.C. is not applicable retroactively to the imports involved in this action, citing several Supreme Court decisions. Defendant's argument may finally prove to be correct, but a final decision on such issue is more effectively, and thus more appropriately, to be rendered in the course of normal judicial deliberations, with an opportunity for each party to fully present its arguments on the question. Because of the non-dispositive nature of the motion to amend, plaintiff has not had an opportunity to rebut the allegations, raised in defendant's opposition to plaintiff's motion, of the non-retroactivity of *IPSCO*. For these reasons, the Court chooses to grant leave for plaintiff to amend its complaint as requested and to decide the additional issue raised thereby in the course of its final decision on the merits in this case.

(Slip Op. 90–108)

PRODUCTOS DE BARRO INDUSTRIALIZADOS, S.A. DE C.V., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-10-00808

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion to amend complaint to take into account decision of the Court of Appeals for the Federal Circuit, rendered after the complaint was filed, is granted.]

(Dated October 17, 1990)

Brownstein Zeidman and Schomer (*Irwin P. Altschuler, Ronald M. Wisla*), for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*), for the defendant.

BACKGROUND

MUSGRAVE, *Judge*: In a complaint filed at the outset of this action, plaintiff challenges several aspects of a final administrative review by the Department of Commerce ("Commerce") of an outstanding affirmative countervailing duty determination and order covering imports into the United States of bricks from Mexico.[1] Plaintiff now moves for leave to amend its complaint by adding a challenge of the methodology used by Commerce to calculate a country-wide countervailing duty assessment rate applicable to imports of the subject merchandise into this country by the plaintiff between July 31, 1984 and December 31, 1985. Plaintiff seeks to argue that the methodology has been rendered impermissible by a decision of the Court of Appeals for the Federal Circuit in *IPSCO, Inc. and IPSCO Steel, Inc. v. United States*, 899 F.2d 1192 (1990) issued after the initiation of the present action. Defendant opposes the motion. In calculating the country-wide countervailing duty rate in this case, Commerce, pursuant to its past practice, excluded from the calculation data on exports of Mexican firms that were found to have received no subsidy benefits or de minimis benefits. Plaintiff's present complaint contains two counts contesting the propriety of the imposition of countervailing duties on the subject merchandise absent an affirmative injury determination by the International Trade Commission. After the complaint was filed, the C.A.F.C. rendered its decision in *IPSCO*, which decision, plaintiff contends, renders invalid Commerce's exclusion from its calculations of the firms that received no or *de minimis* benefits. In the present motion, plaintiff seeks to add to its complaint a third count consisting of four paragraphs, three substantive, challenging the exclusion, and one that incorporates by reference into the third count all previous paragraphs in the first two counts. Defendant opposes plaintiff's motion, arguing first that plaintiff failed to exhaust its administrative remedies by not contesting the exclusion before the agency, and second, that the holding of

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[1] The final review is published at 53 Fed. Reg. 38,314 (September 30, 1988). Plaintiff filed its complaint with this court on October 28, 1988.

the C.A.F.C. in *IPSCO* is not applicable retroactively to the entries at issue in this case.

DISCUSSION

This motion and the parties' arguments raise three principal issues: the permissibility generally of amending a previously filed complaint; the matter of exhaustion of remedies; and the question of the retroactivity of the *IPSCO* decision. Rule 15(a) of this Court provides that leave to amend a pleading after a response thereto has been filed "shall be freely given when justice so requires." Construing Rule 15(a) of the Federal Rules of Civil Procedure which contains this identical language, the United States Supreme Court stated,

> [T]his mandate is to be heeded. * * * If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on behalf of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). While the Court acknowledged that the decision whether or not to grant such leave is within the discretion of the trial court, the emphasis with which it stated the above principle suggests that statement is to be substantially heeded. This Court too has recognized that leniency is generally to be afforded in deciding whether to allow amendment of a complaint. *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). There has been no allegation or showing of bad faith or lack of due diligence on the part of plaintiff in requesting leave to amend its complaint. *Ceteris paribus*, then, the language of Rule 15(a) and the above decisions suggest that plaintiff's request should be granted. In its opposition, however, defendant raises the issue of exhaustion of administrative remedies and the question as to whether the *IPSCO* decision is applicable in this action.

It is a general rule that a party aggrieved by an agency decision or action must exhaust its remedies for relief on that issue at the agency level before it may contest the decision or action before a reviewing court. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). That rule is not, however, absolute or inflexible. Paragraph (d) of 28 U.S.C. § 2637 provides that this Court "shall, where appropriate, require the exhaustion of administrative remedies." Thus, exhaustion is required not absolutely but when such a requirement is "appropriate". See, e.g., *Kejriwal Iron & Steel Works, Ltd. v. United States*, 14 CIT ___, ___, 729 F. Supp. 1365, 1368 (1990). Concomitantly, the exhaustion requirement is not jurisdictional in nature. *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987). In determining whether it would be appropriate to require exhaustion in a given instance (or more accurately, to refuse to allow a party to raise an issue not raised before

the agency) courts "must resist inflexible applications of the doctrine—characteristic of jurisdictional rules which frustrate the ability to apply exceptions developed to cover "exceptional cases or particular circumstances * * * where injustice might otherwise result" if it were strictly applied." *Al Tech*, 11 CIT at 377, 661 F. Supp. at 1210 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Courts have recognized an exception to the exhaustion doctrine in circumstances suggesting that requiring exhaustion "would be futile or an insistence on a useless formality." *See Rhone Poulenc*, 7 CIT at 135, 583 F. Supp. at 610. Similarly, this Court has not required plaintiffs to pursue courses of action which appear unlikely to produce relief or which represent "manifestly inadequate" remedies. One of the "exceptional cases or particular circumstances enumerated" by the Supreme Court in *Hormel* is the situation "in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied *might* have materially altered the result." 312 U.S. at 558-59 (footnote omitted; emphasis added). In that case, after the lower court had issued the decision under review, the Supreme Court had rendered a decision dispositive of the issue raised before it on appeal; accordingly, it considered the new issue on appeal notwithstanding the absence of exhaustion of administrative remedies on the question. Pursuant to that exception, this Court too has shown an unwillingness to apply the exhaustion doctrine when the issue sought to be raised before the court arises from a judicial decision rendered after the agency action or determination under review. *See, e.g., Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986); *Alhambra Foundry Co., Ltd. v. United States*, 12 CIT, ___, ___, 685 F. Supp. 1252, 1256 (1988) (citing *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 544 F. Supp. 883, *aff'd* 69 CCPA 172, 683 F.2d 399 (1982)). Such is the situation presented in this case by the intervening C.A.F.C. decision in *IPSCO*, and under the above precedent the Court finds that the exhaustion requirement is therefore inapplicable in these circumstances to plaintiff's claim regarding the exclusion from Commerce's calculations of non-benefitting or *de minimis* companies.

Defendant does not contest this exception, but rather argues that the C.A.F.C. decision is not applicable retroactively to the imports involved in this action, citing several Supreme Court decisions. Defendant's argument may finally prove to be correct, but a final decision on such issue is more effectively, and thus more appropriately, to be rendered in the course of normal judicial deliberations, with an opportunity for each party to fully present its arguments on the question. Because of the non-dispositive nature of the motion to amend, plaintiff has not had an opportunity to rebut the allegations, raised in defendant's opposition to plaintiffs motion, of the non-retroactivity of *IPSCO*. For these reasons, the Court chooses to grant leave for plaintiff to amend its complaint as requested and to decide the additional issue raised thereby in the course of its final decision on the merits in this case.

(Slip Op. 90–109)

CERAMICA REGIOMONTANA, S.A., CERAMICAS Y PISOS INDUSTRIALES DE CULIACAN, S.A. DE C.V., AND INDUSTRIAS INTERCONTINENTAL, S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 89-06-00323

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion to amend complaint to take into account decision of the Court of Appeals for the Federal Circuit, rendered after the complaint was filed, is granted.]

(Dated October 17, 1990)

Brownstein Zeidman and Schomer (*Steven P. Kersner, Ronald M. Wisla*), for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*), for the defendant.

BACKGROUND

MUSGRAVE, *Judge*: In a complaint filed at the outset of this action, plaintiff challenges several aspects of a final administrative review by the Department of Commerce ("Commerce") of an outstanding affirmative countervailing duty determination and order covering imports into the United States of ceramic tile from Mexico.[1] Plaintiff now moves for leave to amend its complaint by adding a challenge of the methodology used by Commerce to calculate a country-wide countervailing duty assessment rate applicable to imports of the subject merchandise into this country by the plaintiff between January 1 and December 31, 1986. Plaintiff seeks to argue that the methodology has been rendered impermissible by a decision of the Court of Appeals for the Federal Circuit in *IPSCO, Inc. and IPSCO Steel, Inc. v. United States*, 899 F.2d 1192 (1990) issued after the initiation of the present action. Defendant opposes the motion. In calculating the country-wide countervailing duty rate in this case, Commerce, pursuant to its past practice, excluded from the calculation data on exports of Mexican firms that were found to have received no subsidy benefits or *de minimis* benefits. Plaintiff's present complaint contains two counts contesting the propriety of the imposition of countervailing duties on the subject merchandise absent an affirmative injury determination by the International Trade Commission. After the complaint was filed, the CAFC rendered its decision in *IPSCO*, which decision, plaintiff contends, renders invalid Commerce's exclusion from its calculations of the firms that received no or *de minimis* benefits. In the present motion, plaintiff seeks to add to its complaint a third count consisting of four paragraphs, three substantive, challenging the exclusion, and one that incorporates by reference into the third count all previous paragraphs in the first two counts. Defendant opposes plaintiff's motion, arguing first that plaintiff filed to exhaust its administrative remedies by not contest-

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[1] The final review is published at 54 Fed. Reg. 19,930 (May 9, 1989). Plaintiff filed its complaint with this court on February 9, 1990.

ing the exclusion before the agency, and second, that the holding of the CAFC in *IPSCO* is not applicable retroactively to the entries at issue in this case.

DISCUSSION

This motion and the parties' arguments raise three principal issues: the permissibility generally of amending a previously filed complaint; the matter of exhaustion of remedies; and the question of the retroactivity of the *IPSCO* decision. Rule 15(a) of this Court provides that leave to amend a pleading after a response thereto has been filed "shall be freely given when justice so requires." Construing Rule 15(a) of the Federal Rules of Civil Procedure which contains this identical language, the United States Supreme Court stated,

> [T]his mandate is to be heeded. * * * If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on behalf of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). While the Court acknowledged that the decision whether or not to grant such leave is within the discretion of the trial court, the emphasis with which it stated the above principle suggests that statement is to be substantially heeded. This Court too has recognized that leniency is generally to be afforded in deciding whether to allow amendment of a complaint. *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). There has been no allegation or showing of bad faith or lack of due diligence on the part of plaintiff in requesting leave to amend its complaint. *Ceteris paribus*, then, the language of Rule 15(a) and the above decisions suggest that plaintiff's request should be granted. In its opposition, however, defendant raises the issue of exhaustion of administrative remedies and the question as to whether the *IPSCO* decision is applicable in this action.

It is a general rule that a party aggrieved by an agency decision or action must exhaust its remedies for relief on that issue at the agency level before it may contest the decision or action before a reviewing court. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). That rule is not, however, absolute or inflexible. Paragraph (d) of 28 U.S.C. § 2637 provides that this Court "shall, where appropriate, require the exhaustion of administrative remedies." Thus, exhaustion is required not absolutely but when such a requirement is "appropriate". See, *e.g., Kejriwal Iron & Steel Works, Ltd. v. United States*, 14 CIT ___, ___, 729 F. Supp. 1365, 1368 (1990). Concomitantly, the exhaustion requirement is not jurisdictional in nature. *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987). In determing whether it would be appropriate to require exhaustion in a given instance (or more

accurately, to refuse to allow a party to raise an issue not raised before the agency) courts "must resist inflexible applications of the doctrine—characteristic of jurisdictional rules which frustrate the ability to apply exceptions developed to cover "exceptional cases or particular circumstances * * * where injustice might otherwise result" if it were strictly applied." Al Tech, 11 CIT at 377, 661 F. Supp. at 1210 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Courts have recognized an exception to the exhaustion doctrine in circumstances suggesting that requiring exhaustion "would be futile or an insistence on a useless formality." See *Rhone Poulenc*, 7 CIT at 135, 583 F. Supp. at 610. Similarly, this Court has not required plaintiffs to pursue courses of action which appear unlikely to produce relief or which represent "manifestly inadequate" remedies. One of the "exceptional cases or particular circumstances" enumerated by the Supreme Court in *Hormel* is the situation "in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied *might* have materially altered the result." 312 U.S. at 558-59 (footnote omitted; emphasis added). In that case, after the lower court had issued the decision under review, the Supreme Court had rendered a decision dispositive of the issue raised before it on appeal; accordingly, it considered the new issue on appeal notwithstanding the absence of exhaustion of administrative remedies on the question. Pursuant to that exception, this Court too has shown an unwillingness to apply the exhaustion doctrine when the issue sought to be raised before the court arises from a judicial decision rendered after the agency action or determination under review. See, *e.g.*, *Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986); *Alhambra Foundry Co., Ltd. v. United States*, 12 CIT, ___, ___, 685 F. Supp. 1252, 1256 (1988) (citing *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 544 F. Supp. 883, aff'd 69 CCPA 172, 683 F.2d 399 (1982)). Such is the situation presented in this case by the intervening CAFC decision in *IPSCO*, and under the above precedent the Court finds that the exhaustion requirement is therefore inapplicable in these circumstances to plaintiff's claim regarding the exclusion from Commerce's calculations of non-benefitting or *de minimis* companies.

Defendant does not contest this exception, but rather argues that the CAFC decision is not applicable retroactively to the imports involved in this action, citing several Supreme Court decisions. Defendant's argument may finally prove to be correct, but a final decision on such issue is more effectively, and thus more appropriately, to be rendered in the course of normal judicial deliberations, with an opportunity for each party to fully present its arguments on the question. Because of the non-dispositive nature of the motion to amend, plaintiff has not had an opportunity to rebut the allegations, raised in defendant's opposition to plaintiff's motion, of the non-retroactivity of *IPSCO*. For these reasons, the Court chooses to grant leave for plaintiff to amend its complaint as

requested and to decide the additional issue raised thereby in the course of its final decision on the merits in this case.

(Slip Op. 90–110)

PRODUCTOS DE BARRO INDUSTRIALIZADOS, S.A. DE C.V., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90-01-00045

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion to amend complaint to take into account decision of the Court of Appeals for the Federal Circuit, rendered after the complaint was filed, is granted.]

(Dated October 17, 1990)

Brownstein Zeidman and Schomer (Irwin P. Altschuler, Ronald M. Wisla), for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*), for the defendant.

BACKGROUND

MUSGRAVE, *Judge*: In a complaint filed at the outset of this action, plaintiff challenges several aspects of a final administrative review by the Department of Commerce ("Commerce") of an outstanding affirmative countervailing duty determination and order covering imports into the United States of bricks from Mexico.[1] Plaintiff now moves for leave to amend its complaint by adding a challenge of the methodology used by Commerce to calculate a country-wide countervailing duty assessment rate applicable to imports of the subject merchandise into this country by the plaintiff between July 31, 1984 and December 31, 1985. Plaintiff seeks to argue that the methodology has been rendered impermissible by a decision of the Court of Appeals for the Federal Circuit in *IPSCO, Inc. and IPSCO Steel, Inc. v. United States*, 899 F.2d 1192 (1990) issued after the initiation of the present action. Defendant opposes the motion. In calculating the country-wide countervailing duty rate in this case, Commerce, pursuant to its past practice, excluded from the calculation data on exports of Mexican firms that were found to have received no subsidy benefits or *de minimis* benefits. Plaintiff's present complaint contains two counts contesting the propriety of the imposition of countervailing duties on the subject merchandise absent an affirmative injury determination by the International Trade Commission. After the complaint was filed, the C.A.F.C. rendered its decision in *IPSCO*, which decision, plaintiff contends, renders invalid Commerce's exclusion from its calculations of the firms that received no or *de minimis* benefits. In the present mo-

[1]The final review is published at 55 Fed. Reg. 1,073 (January 11, 1990). Plaintiff filed its complaint with this Court on February 9, 1990.

tion, plaintiff seeks to add to its complaint a third count consisting of four paragraphs, three substantive, challenging the exclusion, and one that incorporates by reference into the third count all previous paragraphs in the first two counts. Defendant opposes plaintiff's motion, arguing first that plaintiff filed to exhaust its administrative remedies by not contesting the exclusion before the agency, and second, that the holding of the C.A.F.C. in *IPSCO* is not applicable retroactively to the entries at issue in this case.

DISCUSSION

This motion and the parties' arguments raise three principal issues: the permissibility generally of amending a previously filed complaint; the matter of exhaustion of remedies; and the question of the retroactivity of the *IPSCO* decision. Rule 15(a) of this Court provides that leave to amend a pleading after a response thereto has been filed "shall be freely given when justice so requires." Construing Rule 15(a) of the Federal Rules of Civil Procedure which contains this identical language, the United States Supreme Court stated,

> [T]his mandate is to be heeded. * * * If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on behalf of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). While the Court acknowledged that the decision whether or not to grant such leave is within the discretion of the trial court, the emphasis with which it stated the above principle suggests that statement is to be substantially heeded. This Court too has recognized that leniency is generally to be afforded in deciding whether to allow amendment of a complaint. *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). There has been no allegation or showing of bad faith or lack of due diligence on the part of plaintiff in requesting leave to amend its complaint. *Ceteris paribus*, then, the language of Rule 15(a) and the above decisions suggest that plaintiff's request should be granted. In its opposition, however, defendant raises the issue of exhaustion of administrative remedies and the question as to whether the *IPSCO* decision is applicable in this action.

It is a general rule that a party aggrieved by an agency decision or action must exhaust its remedies for relief on that issue at the agency level before it may contest the decision or action before a reviewing court. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). That rule is not, however, absolute or inflexible. Paragraph (d) of 28 U.S.C. § 2637 provides that this Court "shall, where appropriate, require the exhaustion of administrative remedies." Thus, exhaustion is required not absolutely but when such a requirement is "appropriate". See, *e.g.*, *Kejriwal*

Iron & Steel Works, Ltd. v. United States, 14 CIT, ____, ____, 729 F. Supp. 1365, 1368 (1990). Concomitantly, the exhaustion requirement is not jurisdictional in nature. *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987). In determining whether it would be appropriate to require exhaustion in a given instance (or more accurately, to refuse to allow a party to raise an issue not raised before the agency) courts "must resist inflexible applications of the doctrine—characteristic of jurisdictional rules which frustrate the ability to apply exceptions developed to cover 'exceptional cases or particular circumstances * * * where injustice might otherwise result' if it were strictly applied." *Al Tech*, 11 CIT at 377, 661 F. Supp. at 1210 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Courts have recognized an exception to the exhaustion doctrine in circumstances suggesting that requiring exhaustion "would be futile or an insistence on a useless formality." *See Rhone Poulenc*, 7 CIT at 135, 583 F. Supp. at 610. Similarly, this Court has not required plaintiffs to pursue courses of action which appear unlikely to produce relief or which represent "manifestly inadequate" remedies. One of the "exceptional cases or particular circumstances" enumerated by the Supreme Court in *Hormel* is the situation "in which there have been judicial interpretations of existing law after decision below and pending appeal-interpretations which if applied *might* have materially altered the result." 312 U.S. at 558-59 (footnote omitted; emphasis added). In that case, after the lower court had issued the decision under review, the Supreme Court had rendered a decision dispositive of the issue raised before it on appeal; accordingly, it considered the new issue on appeal notwithstanding the absence of exhaustion of administrative remedies on the question. Pursuant to that exception, this Court too has shown an unwillingness to apply the exhaustion doctrine when the issue sought to be raised before the court arises from a judicial decision rendered after the agency action or determination under review. *See, e.g., Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986); *Alhambra Foundry Co., Ltd. v. United States*, 12 CIT, ____, ____, 685 F. Supp. 1252, 1256 (1988) (citing *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 544 F. Supp. 883, aff'd 69 CCPA 172, 683 F.2d 399 (1982)). Such is the situation presented in this case by the intervening C.A.F.C. decision in *IPSCO*, and under the above precedent the Court finds that the exhaustion requirement is therefore inapplicable in these circumstances to plaintiff's claim regarding the exclusion from Commerce's calculations of nonbenefitting or *de minimis* companies.

Defendant does not contest this exception, but rather argues that the C.A.F.C. is not decision is not applicable retroactively to the imports involved in this action, citing several Supreme Court decisions. Defendant's argument may finally prove to be correct, but a final decision on such issue is more effectively, and thus more appropriately, to be rendered in the course of normal judicial deliberations, with an opportunity for each party to fully present its arguments on the question. Because of

the non-dispositive nature of the motion to amend, plaintiff has not had an opportunity to rebut the allegations, raised in defendant's opposition to plaintiff's motion, of the non-retroactivity of *IPSCO*. For these reasons, the Court chooses to grant leave for plaintiff to amend its complaint as requested and to decide the additional issue raised thereby in the course of its final decision on the merits in this case.

(Slip Op. 90-111)

APPLE COMPUTER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-01-00125

ON DEFENDANT'S MOTION TO AMEND JUDGMENT

Pursuant to Rule 59(e) of the Rules of this Court, the defendant moves for an order altering or amending the judgment in *Apple Computer, Inc. v. United States*, 14 CIT____, Slip Op. 90-14 (Feb. 13, 1990), and contending that the Apple x-y plotters were properly classified by the Customs Service as "[d]rafting and drawing machines," under item 710.80, TSUS.

Held: Since the defendant has not established that the granting of a motion to alter or amend the judgment is appropriate, the motion is denied.

[Defendant's motion denied.]

(Dated October 19, 1990)

Baker & McKenzie (*Bruce H. Jackson* and *Jay C. Clemens*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Al J. Daniel, Jr.*) and (*Sheryl A. French*, United States Customs Service, Of Counsel), for defendant.

RE, *Chief Judge*: Pursuant to Rule 59(e) of the Rules of this Court, the defendant moves to alter or amend the judgment in *Apple Computer, Inc. v. United States*, 14 CIT____, Slip Op. 90-14 (Feb. 13, 1990).

In *Apple Computer*, the imported merchandise consisted of Apple x-y plotters and plotter pens. The plotters were classified by the Customs Service as "[d]rafting and drawing machines," under item 710.80, TSUS, and the plotter pens were classified as "[m]arking pens having a wick-like tip of felt or other material," under item 760.15, TSUS.

Plaintiff protested these classifications, and contended that the plotters were properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, and that the pens were properly classifiable as "[p]arts of automatic data-processing machines and units thereof," under item 676.52, TSUS. Alternatively, plaintiff contended that if the court determined that the plotters were properly classified by the Customs Service as "[d]rafting and drawing machines," under item 710.80, TSUS, then the plotter pens were properly classifiable as parts of drafting machines, under item 710.80, TSUS.

After trial, and upon consideration of the testimony of the witnesses, the briefs, and the exhibits introduced at trial, the court held that, as to the plotters, "plaintiff has overcome the presumption of correctness that

attaches to the classification by Customs, and that the imported 'x-y plotters' are properly classifiable as '[o]ffice machines not specially provided for,' under item 676.30, TSUS." *Apple Computer*, Slip Op. at 22. As to the plotter pens, however, the court held that they "were properly classified by Customs as '[m]arking pens having a wick-like tip of felt or other material,' under item 760.15, TSUS." *Id.* at 26.

By this motion, the defendant requests the court to alter or amend that part of its judgment which held that the plotters had been improperly classified by Customs, as "[d]rafting and drawing machines," under item 710.80, TSUS, and were properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS.

Since the defendant has not established that the granting of a motion to alter or amend the judgment is appropriate, the motion is denied.

Discussion

In considering a motion to alter or amend the judgment, made under Rule 59(e) of the Rules of this Court, the court may look for guidance to those cases which have interpreted and applied the corresponding federal rule of civil procedure. *See National Hand Tool Corp. v. United States*, 14 CIT____, Slip Op. 90-69 at 4 (July 23, 1990).

Some courts have held that a Rule 59(e) motion allows the trial court to reconsider issues previously litigated, and to examine the correctness of its judgment. *See Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir. 1987). Other courts, however, have noted that a Rule 59(e) motion should not be granted if it merely restates legal arguments that have already been carefully considered by the court. *See, e.g., Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384, 390 (D.P.R. 1981); *Erickson Tool Co. v. Balas Collet Co.*, 277 F. Supp. 226, 234 (N.D. Ohio 1967), *aff'd*, 404 F.2d 35 (6th Cir. 1968). Nonetheless, it is clear that whether to grant or deny a Rule 59(e) motion is committed to the sound discretion of the trial court. *See Frito-Lay*, 92 F.R.D. at 390.

In its first contention on its motion to alter or amend the judgment of the court in *Apple Computer*, the defendant states that: "The Court's decision appears to consider only whether the plotter is a 'drafting machine' and does not consider whether it is described by any of the other terms in item 710.80." Specifically, the defendant contends that the x-y plotter may be described as a "drawing machine," under item 710.80, TSUS. The defendant states further that: "The Court's decision in this case appears to consider only whether the plotter at issue meets the definition of a 'drafting machine.'" (emphasis in original). The defendant also states that its "trial brief argued that the evidence demonstrated that the plotter was *either* 'a "drafting machine," "drawing [or] marking out * * * instrument," or a similar "machine not specially provided for" all of which are encompassed by [item 710.80].'" (emphasis in original). In a footnote, the defendant added that: "These alternative bases for supporting the liquidated classification and assessment of duties under item 710.80, TSUS, [were] plainly raised by defendant in its brief."

The court's opinion, however, indicates that the "alternative bases" were not merely raised but were duly considered and decided. Although TSUS item 710.80 is not quoted verbatim in its entirety throughout the opinion, it is set forth in its entirety at the outset of the opinion under the appropriate heading "Plotters Classified Under." *See Apple Computer*, Slip Op. at 3. Under that heading the court also set forth the applicable part of Schedule 7, Part 2, Subpart C.

In rearguing this case by its motion to alter or amend, the defendant restates that the "question as to the Apple color plotter is whether it is more accurately described by *any* of the terms in item 710.80, not just whether it is a 'drafting machine."' (emphasis in original). The defendant restates the obvious.

The references to "drafting" in the memorandum opinion reflect the time and effort devoted at the trial to "drafting." Surely, it was not the sole thrust of either the plaintiff or the defendant's case. For example, the plaintiff's witness Mr. Phillip Williams was given a definition of "drafting machine" and responded that "to the best of his knowledge, the plotter is not 'known commercially' as a 'drafting and drawing machine."' *Apple Computer*, Slip Op. at 10. In addition, in observing the manual for the x-y plotters, Mr. Williams observed that:

> The manual contained a list of drawings that could be made with the plotter, including "Engineering drawings," "Logic diagrams," "Architectural details," and "Circuit diagrams." Mr. Williams identified these drawings as the type of drawings he had done in a drafting course, as part of his high school education. He admitted that the final product of CAD systems "serve the same function to an engineer or for an architect as drawings created by hand with [the type of drafting machine he had used at school].

Id.

It is to be noted that Mr. Christopher M. Stammen, the defendant's witness, "the director of Development for Computer-aided Drafting Products of Versacad Corporation[,] * * * was qualified 'as an expert in programming and CAD software and related equipment used for drafting, including the X, Y plotters."' *Id.* at 12. His demonstration of the use of the Apple plotter with the Cadapple Software is described as follows in the memorandum opinion:

> Using the Apple plotter, Mr. Stammen created a diagram similar to diagrams he had created in a drafting course he had taken as part of his education. Mr. Stammen also observed a set of drafting tools that he had used during his drafting course. He identified several tools which he could use to produce a diagram similar to the one he had made using the Apple plotter.
>
> The government introduced a definition of "drafting" as:
>
>> the act of delineating a drawing of an object, its structure, or its parts in the graphic language universally employed to communicate the engineering intent of a design, or problem. Engineering drawings consist of lines representing surfaces, edges, and con-

> tours of objects, supplemented by symbols, dimensional sizes, and notes. In a broad sense, drafting is the graphical development of an engineering problem or record.

> 5 *The New Encyclopedia Brittanica* 973 (15th ed. 1984). Mr. Stammen agreed with this definition of drafting, and agreed "that what the [Apple] plotter does or creates is a product of drafting[.]" He also stated that, in his opinion, the Apple plotter fell within the language of item 710.80, TSUS.

Id. at 13.

It would also seem clear that the reference to "drafting" in the memorandum opinion is a shorthand for merchandise embraced in item 710.80, TSUS, and reflects the many references to "drafting" made throughout the trial.

In further support of its contention, the defendant cites *John A. Steer Co. v. United States*, 53 CCPA 67, C.A.D. 879 (1966). In *Steer*, the imported merchandise consisted of "rectangular coordinate plotters." The plotters were classified by the Customs Service as "mathematical instruments," under paragraph 360 of the Tariff Act of 1930, as modified. Plaintiff protested this classification, and contended that the plotters were properly classifiable as "drawing instruments," also under paragraph 360. *See id.* at 67. The Customs Court held for the defendant, and sustained the classification by Customs. *See id.*

On appeal, the Court of Customs and Patent Appeals reversed. The court first reviewed the evidence, and then concluded that the coordinate plotters were mechanical instruments which "are nothing more or less than instruments for drawing extremely accurate parallel lines." *Id.* at 70. The court added that "one would consider a mathematical instrument to be designed to perform a mathematical operation such as adding, subtracting, multiplying, dividing, integrating, etc." *Id.* The court also noted that "the uncontroverted testimony is that rectangular coordinate plotters can perform none of these operations." *Id.*

Despite the classification of coordinate plotters as "drawing instruments" in *Steer*, it is clear that since the plotters in this case are factually distinguishable, *Steer* is not persuasive authority. The Apple x-y plotters in this case are known as "output devices," and are intended to be used with computers. *See Apple Computer*, Slip Op. at 18. Furthermore, the x-y plotters "bear a strong physical resemblance to computer dot matrix printers." *Id.* at 17. In contrast, the coordinate plotters in *Steer* were mechanical instruments, designed for use as hand tools. Indeed, in support of this motion the defendant notes that the coordinate plotters in *Steer* were "mechanical device[s] that, from the court of appeal's description, [were] quite similar to the traditional 'drafting machine' referred to in the case now before this Court."

It would seem clear that the court considered whether the x-y plotter was described by any of the terms in item 710.80, TSUS. The court noted that the x-y plotters were classified by the Customs Service under item 710.80, TSUS, as "Drafting and *drawing machines*, instruments, and

apparatus, and parts thereof." *Apple Computer*, Slip Op. at 3 (emphasis added). It cannot be doubted that the post-trial briefs of both parties expressly raised arguments pertaining to the classification of the Apple x-y plotters as "drawing machines."

Furthermore, the heading to item 710.80, TSUS, includes "[d]rafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribers, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are *drawing marking-out or mathematical calculating instruments*. * * *" (emphasis added). The court in *Apple Computer* relied in part on the doctrine of *noscitur a sociis*, i.e., known by its associates. *See Apple Computer*, Slip Op. at 19. Hence, the terms "drawing machine" or "drawing instrument" must be interpreted in association with the other terms found in the heading to item 710.80, TSUS. *See Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, 132, C.D. 4645, 411 F. Supp. 783, 784 (1976).

All of the instruments listed in item 710.80, TSUS, are mechanical instruments, designed to assist draftspersons in drawing by hand. None of the instruments are designed for use with computers. Hence, the term "drawing machine" must be interpreted similarly, as a mechanical instrument.

The defendant also contends that the court misapplied the principles of statutory construction that apply to *eo nomine* terms. In support of its contention, the defendant cites *United States v. Standard Surplus Sales*, 69 CCPA 34, 38, 667 F.2d 1011, 1014 (1981). According to the defendant, the court in *Standard Surplus* "concluded that newly created merchandise fell under an *eo nomine* provision based upon *use* of the merchandise, even though there were significant physical differences between it and merchandise existing at the time of enactment of the tariff provision." (emphasis in original).

In *Standard Surplus*, the Court of Customs and Patent Appeals reversed this court, and held that certain imported backpacks were properly classified by the Customs Service as "luggage," under item 706.24, TSUS. The court considered the similarities between the imported backpacks and "knapsacks," an exemplar of "luggage." Contrary to the defendant's assertion, however, the appellate court in *Standard Surplus* expressly stated that the "attempt to distinguish the imported backpacks from 'knapsacks,' by comparing them to a sample knapsack * * * must fail." *Id.* at 38, 667 F.2d at 1014. The court noted that backpacks and knapsacks have similar uses and similar lexicographic definitions, and concluded that the imported backpacks were properly classifiable under the same item as knapsacks. *See id.* at 39-41, 667 F.2d at 1014-16.

In addition, in this case, the court carefully considered the similarities in use between the Apple x-y plotters and drafting and drawing machines. The court noted that traditional drafting machines are used to assist designers in writing by hand. *See Apple Computer*, Slip Op. at 18. In contrast, the Apple x-y plotters are designed for use with computers.

Hence, the court concluded that "the Apple plotter and traditional drafting machines have clearly different functions or uses." *Id.*

In customs classification cases the question presented is often difficult and close. In these cases, the parties render valuable assistance to the court in presenting the testimony of expert witnesses whose testimony facilitates deciding the classification question presented. It is the function of the trial court to pass upon the credibility, reliability, and persuasiveness of the testimony presented. A resolution of the issue by accepting the testimony of one witness rather than that of another does not imply a failure to consider the testimony of all witnesses who have testified. It would be unfair and a disservice to experts who testify in these cases to require trial courts to attempt to set forth the mental process which causes a trial judge to find the testimony of one expert witness more persuasive than that of another witness. It should suffice if the court has heard and considered all of the testimony fairly, and has set forth findings which reveal clearly the testimony that it has accepted as persuasive.

Conclusion

It is the conclusion of the court that the defendant has failed to establish that the granting of a motion to amend or alter the judgment in *Apple Computer, Inc. v. United States*, 14 CIT ____, Slip Op. 90-14 (Feb. 13, 1990), is appropriate. Accordingly, the defendant's motion is denied.

Abstracted Classification Decisions

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/385 9/27/90 Newman, S.J.	Nadel Trading Corp.	89-5-00267	737.47, 737.18, 737.96, 734.15, etc. Various rates	912.34, 912.30, 912.20 Free of duty	Agreed statement of facts	Newark Stuffed figures, etc.
C90/386 10/3/90 Re, C.J.	Fathom/H.I.M., Inc.	87-2-00234	376.56 Various rates	A735.20 Free of duty	Agreed statement of facts	Tampa Wetsuits or divesuits
C90/387 10/3/90 Re, C.J.	Fathom/H.I.M., Inc.	88-12-00910	359.50 or 376.56 Various rates	A359.60 or 359.60 A735.20 Various rates	Agreed statement of facts	Tampa Wetsuits or divesuits
C90/388 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01020	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/389 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01048	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/390 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01064	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/391 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01065	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/392 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01066	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/393 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01067	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/394 10/4/90 Aquilino, J.	Eastman Watch Co.	85-8-01068	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/395 10/4/90 Aquilino, J.	Eastman Watch Co.	85–8–01072	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/396 10/4/90 Aquilino, J.	Jawhar Trading Corp.	85–7–00994	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/397 10/4/90 Aquilino, J.	S.K. Suppliers	85–8–01074	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/398 10/4/90 Aquilino, J.	S.K. Supplier.	85–8–01075	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/399 10/4/90 Aquilino, J.	S.K. Suppliers	85–8–01076	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/400 10/4/90 Aquilino, J.	S.K. Suppliers	85–8–01077	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/401 10/4/90 Aquilino, J.	Solomon Kaufman	85–8–01069	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/402 10/5/90 Aquilino, J.	A Classic Time	86–9–01204	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/403 10/5/90 Aquilino, J.	A Classic Time	86–11–01384	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/404 10/5/90 Aquilino, J.	Belfont Sales Corp.	85–11–01681	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/405 10/5/90 Aquilino, J.	Belfont Sales Corp.	85-11-01682	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/406 10/5/90 Aquilino, J.	Belfont Sales Corp.	86-6-00737	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/407 10/5/90 Aquilino, J.	Belfont Sales Corp.	86-9-01202	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/408 10/5/90 Re, C.J.	Belwith Int'l, Ltd.	89-1-00022	534.94 Various rates	727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
C90/409 10/5/90 Aquilino, J.	Branded Time Corp.	86-9-01207	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/410 10/5/90 Aquilino, J.	Delta Impex Watch Corp.	86-10-01298	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/411 10/5/90 Aquilino, J.	D&M Watch Corp.	85–10–01528	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/412 10/5/90 Aquilino, J.	Eastman Watch Co.	86–9–01210	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/413 10/5/90 Aquilino, J.	Eastman Watch Co.	86–10–01249	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/414 10/5/90 Re, C.J.	Fathom/H.I.M., Inc.	88–5–00333	359.50 or 376.56 Various rates	A359.60 or 359.60, A735.20 or 376.56 Various rates	Agreed statement of facts	Tampa Wetsuits or divesuits
C90/415 10/5/90 Aquilino, J.	Grundig Electric Co.	86–9–01199	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/416 10/5/90 Aquilino, J.	Jawhar Trading Co.	85-12-01758	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/417 10/5/90 Aquilino, J.	Juno Export	85-11-01595	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/418 10/5/90 Aquilino, J.	Kwanasia of America, Inc	86-10-01340	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/419 10/5/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-9-01179	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/420 10/5/90 Aquilino, J.	Liberty Int'l Trading, Inc.	86-9-01205	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/421 10/5/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-11-01387	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/422 10/5/90 Aquilino, J.	Miracle Watch Co.	86-9-01208	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/423 10/5/90 Aquilino, J.	Omni Quartz, Ltd.	86-9-01206	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/424 10/5/90 Aquilino, J.	Omni Quartz, Ltd.	86-10-01253	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/425 10/5/90 Aquilino, J.	Omni Quartz, Ltd.	86–11–01386	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/426 10/5/90 Aquilino, J.	S.K. Suppliers	86–9–01203	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/427 10/5/90 Aquilino, J.	Time Electronics Corp.	85–11–01670	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/428 10/5/90 Aquilino, J.	Wallem Int'l Corp.	86–9–01178	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/429 10/5/90 Aquilino, J.	Wallem Int'l Corp.	86–9–01209	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/430 10/5/90 Aquilino, J.	Wallem Int'l Corp.	86–11–01383	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/431 10/5/90 Aquilino, J.	World Forum Watch	86–11–01401	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/432 10/9/90 Aquilino, J.	Belfont Sales Corp.	85–8–01124	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/433 10/9/90 Aquilino, J.	Delta Impex Watch Corp.	85–8–01118	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/434 10/9/90 Aquilino, J.	F & K Watch Company	85-9-01154	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/435 10/10/90 Aquilino, J.	Juno Export	85-9-01313	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/436 10/10/90 Aquilino, J.	Kwanasia of America, Inc.	85-11-01592	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/437 10/12/90 Aquilino, J.	Accutime Watch Corp.	87-12-01151	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/438 10/12/90 Aquilino, J.	Alva Watch Corp.	86-12-01514	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/439 10/12/90 Aquilino, J.	Alva Watch Corp.	88-3-00244	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/440 10/12/90 Aquilino, J.	Alva Watch Corp.	88-5-00379	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/441 10/12/90 Aquilino, J.	Anchor Time	86-11-01425	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/442 10/12/90 Aquilino, J.	Anchor Time	87-10-01002	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/443 10/12/90 Aquilino, J.	Bachrach Watch Corp.	87-9-00957	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/444 10/12/90 Aquilino, J.	Belfont Sales Corp.	87-10-01052	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/445 10/12/90 Aquilino, J.	Belfont Sales Corp.	87-11-01124	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/446 10/12/90 Aquilino, J.	Belfont Sales Corp.	88-5-00377	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/447 10/12/90 Aquilino, J.	Century Time Co.	87-10-01059	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/448 10/12/90 Aquilino, J.	Delta Impex Watch Corp.	87-9-00939	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/449 10/12/90 Aquilino, J.	Delta Impex Watch Corp.	88-3-00246	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/450 10/12/90 Aquilino, J.	Delta Impex Watch Corp.	88-8-00682	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/451 10/12/90 Aquilino, J.	Eastman Watch Corp.	86-11-01427	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/452 10/12/90 Aquilino, J.	Eastman Watch Co.	86-11-01489	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/453 10/12/90 Aquilino, J.	Eastman Watch Co.	86-12-01506	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/454 10/12/90 Aquilino, J.	F & K Watch Co.	86-12-01505	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/455 10/12/90 Aquilino, J.	F & K Watch Co.	86-12-01532	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/456 10/12/90 Aquilino, J.	F & K Watch Co.	87-9-00972	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/457 10/12/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-11-01424	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/458 10/12/90 Aquilino, J.	S. K. Suppliers	86-11-01488	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/459 10/12/90 Aquilino, J.	S. K. Suppliers	86-12-01507	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/460 10/12/90 Aquilino, J.	Wallem Int'l Corporation	86-11-01426	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/461 10/12/90 Aquilino, J.	World Forum Watch	87-9-00979	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/462 10/16/90 Aquilino, J.	A Classic Time	87-3-00527	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/463 10/16/90 Aquilino, J.	Befont Sales Corp.	87-3-00485	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/464 10/16/90 Aquilino, J.	Branded Time Corp.	87-3-00522	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/465 10/16/90 Aquilino, J.	Branded Time Corp.	87-8-00867	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/466 10/16/90 Aquilino, J.	Century Time Co.	87-3-00511	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/467 10/16/90 Aquilino, J.	Delta Impex Watch Corp.	85-2-00173	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/468 10/16/90 Aquilino, J.	Delta Impex Watch Corp.	87-3-00477	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/469 10/16/90 Aquilino, J.	Eastman Watch Co.	87-3-00538	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/470 10/16/90 Aquilino, J.	F & K Watch Co.	87-3-00516	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/471 10/16/90 Aquilino, J.	Grundig Electric Co.	85-2-00166	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/472 10/16/90 Aquilino, J.	Jawhar Trading Corp.	87-3-00479	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/473 10/16/90 Aquilino, J.	Miracle Watch Co.	87-3-00519	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/474 10/16/90 Aquilino, J.	Omni Quarts, Ltd.	87-3-00524	716.09-716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/475 10/16/90 Aquilino, J.	Powell River-Alberni Sales	88-8-00616	252.75 2.9%	252.67 Free of Duty	Agreed Statement of facts	Blaine Printing Paper
C90/476 10/16/90 Aquilino, J.	Proline Products, Inc.	87-3-00510	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/477 10/16/90 Aquilino, J.	Soloman Kaufman	87-3-00520	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/478 10/16/90 Aquilino, J.	World Forum Watch	87-3-00482	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASSIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V90/44 10/15/90 DiCarlo, J.	C. J. Tower & Sons of Buffalo Inc.	88-11—604	Trasaction value	$18.98, $17.98, etc.	Agreed statement of facts	Buffalo Rattan baskets

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